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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 312

HARRY R. SWANSON, individually and as Secretary
of State of Nebraska, *et al.*,

Appellants,

vs.

GENE BUCK, individually and as President of the American
Society of Composers, Authors and Publishers, *et al.*

BRIEF OF APPELLEES

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April, 1941.

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Supreme Court of the United States

OCTOBER TERM, 1940

HARRY R. SWANSON, individually and
as Secretary of State of Nebraska,
et al.,

Appellants,

vs.

GENE BUCK, individually and as Presi-
dent of the American Society of
Composers, Authors and Publish-
ers, *et al.*

No. 312

BRIEF OF APPELLEES*

Opinions Below.

The opinion of the District Court for the Western District of Nebraska (R. I, 125-132) is reported in 33 F. Supp. 377. A prior unreported opinion of that court granting a temporary injunction was filed November 13, 1937 (R. I, 121-3).

Statutes Involved.

The Nebraska Statute, the validity of which is involved, is the Act of May 17, 1937, Chapter 138, Nebraska Laws, 1937 (Session Laws, Nebraska, 1937, pp. 488-501). The Statute will be referred to in this brief as the "State Statute." It is printed in full at pages 115-131 of the Appendix to appellees' brief and at R. I, 74-88. Its provisions are summarized below (pp. 25-33).

The State Statute is substantially the same as the Florida Act of June 9, 1937 (Volume I, General Laws of Florida, 1937, Chapter 17807) involved in the companion case of *Watson (Gibbs) v. Buck*, October Term, 1940, No. 610.

* Italics used in this brief are ours unless otherwise indicated.

This case also involves the Federal Copyright Act (35 Stat. L. 1075, Tit. 17, U. S. C., as amended) which is printed in Copyright Office Bulletin No. 14. Copies of this Bulletin will be handed to the Court on the argument.

Scope and Contents of this Brief.

As the Nebraska Statute is substantially the same as the Florida Statute of 1937 which is before this Court for review in Case #610, the following brief is almost the same as that which is filed in Cases #610 and #611, so far as they deal with the last mentioned Florida Statute. In some respects the records are not identical and this has required changes in the respective briefs. Moreover, the two briefs contain references to the records in the respective cases.

The main point relied upon in the Florida brief, i.e., that appellees are not entitled to any relief because they have allegedly violated the Sherman Act and are thus, as it is claimed, guilty of "unclean hands," is not advanced in the brief for appellants in the Nebraska case. Consequently, that point is not considered in this brief except as it is necessarily shown to be without merit in the discussion of the decision of this Court in *McFarland v. American Sugar Refining Co.*, 241 U. S. 79, under Point II hereof. The point is discussed under Point VI of our brief in the Florida case and under Point I of the reply brief in that case.

Statement of the Case.

I. Nature of the suit and proceedings below.

This suit was brought on the *joint* behalf of all members of the American Society of Composers, Authors and Publishers (hereinafter referred to as the "Society"), an unincorporated association recognized by the Laws of the State of New York, consisting of approximately 1,425 composers and authors and 131 publishers of music, and also on behalf of certain members of the Society in their individual capacities, to enjoin enforcement of the State Statute on the ground that it is in conflict with the Federal

Constitution and treaties between the United States and foreign countries (Complaint, R. I, 1-36, Findings "2" and "4," R. I, 133-4).

A temporary injunction restraining the enforcement of the State Statute was granted on November 13, 1937 by a statutory District Court consisting of Judge GARDNER, Circuit Judge, and Judges MUNGER and DONOHUE, District Judges (R. I, 123-5). No appeal was taken from that decree (R. I, 102).

Appellants filed an answer and motion to dismiss the complaint, alleging that appellee Society was a price-fixing monopoly and violated the State Statute and therefore was not entitled to equitable relief (R. I, 98, 100, 103, 107-8).

Existence of the requisite jurisdictional amount was amply established as a fact, and was conceded by appellants (R. I. 167-8).

On January 25, 1940, the court below (consisting of Judge GARDNER, Circuit Judge, and Judges MUNGER and DONOHUE, District Judges), after a trial on the merits, granted a permanent injunction restraining enforcement of the State Statute in its entirety (R. I, 139-41). The Findings of Fact and Conclusions of Law are printed at R. I, 132-9.

Appellants filed a motion for a new trial (R. I, 141-62) which was overruled on March 28, 1940 (R. I, 162-3).

II. Organization of appellee Society was necessary to meet the evil of wholesale infringement of copyrighted musical works by unauthorized public performances for profit.

A. THE NATURE OF THE RIGHT OF "PUBLIC PERFORMANCE FOR PROFIT" REQUIRES COLLECTIVE ACTION ON THE PART OF CREATORS AND PUBLISHERS OF COPYRIGHTED MUSICAL WORKS.

Section 1(e) of the Copyright Law of 1909 confers on all persons who comply with the provisions of that law, "the exclusive right * * * to perform the copyrighted work publicly for profit if it be a musical composition." This

right is often called the "petit droit" or "small right", to distinguish it from the "stage right" or "grand right" which is protected under subdivision (d) of Section 1 of the Copyright Law. The latter section gives owners of copyrighted dramatic works (including dramatico-musical works such as operas, operettas and musical comedies) the exclusive right "to perform or represent the copyrighted work publicly," regardless of whether or not the performance is given for purposes of profit.

Although the stage right had been protected against unauthorized public performances as early as the Copyright Act of 1856 (Act of August 18, 1856, 11 Stat. 138-9), similar protection was denied to composers of *non-dramatic* musical works until enactment of the Musical Copyright Act of 1897 (Act of January 6, 1897, 29 Stat. 481-2, amending R. S. Sec. 4966).

When the law of 1897 was enacted, there were few places where performances of non-dramatic musical compositions were given. The twentieth century, however, brought radical changes in the form of musical entertainment. A very substantial use of copyrighted music in the home on phonograph records developed during the first decade of the century (R. I, 170-72). The second decade witnessed a new form of entertainment *outside* the home in the form of cabarets which mushroomed up throughout the country beginning in 1912 and 1913 (R. I, 172). Patrons were lured into these establishments by featuring the "hit" songs, or leading compositions of current stage shows (R. I, 172).

Notwithstanding the statutory grant of small performing rights in 1897 and 1909, none of these establishments had ever obtained a license from the copyright owner, or paid any compensation for such use prior to the organization of the Society in 1914 (R. I, 172-7, 346-7, 473-4; R. II, 612, 667, 696, 707, 751, 776-7, 784, 1047).

Protection of this so-called "small right" at that time was impossible because copyright owners had no feasible means of discovering infringements of this kind (no record of performances being kept by users, and no means of

ascertaining infringements being available to copyright owners without having a person stationed at the premises when the infringement took place) and because users could not afford to negotiate with each of thousands of copyright owners for each separate performance (Finding "7," R. I, 135-6).

In 1914, the problem became so acute that some of the foremost composers and authors of America, under the leadership of Victor Herbert, organized appellee Society as a cooperative association to combat this evil of widespread unlawful performances of their copyrighted works in a field where the individual creator was completely helpless and had theretofore received no income whatsoever (R. I, 169-72, 174-5, 187, 474, 483, 497, 509; R. II, 666-7, 917).

The court below summed up the situation then existing as follows (Finding "7," R. I, 135-6):

"7. Prior to the organization of the plaintiff Society, authors, composers and publishers who had obtained copyrights for their productions had no practical means of enforcing the exclusive right given them by the Copyright Act. They were not so equipped nor organized to discover violations of their rights, and it would require much time and a large amount of money to detect infringement and to enforce their rights by means of litigation. Few of them secured any revenue from the public performance for profit of their copyrighted musical compositions. Users of music, on the other hand, who wished to obtain the rights of public performance for profit, were unable to ascertain who the copyright owner was and to whom to go and could not economically obtain individual licenses for the separate performance of the large numbers of works required by them daily. It was for the purpose of protecting the legal rights of its members in their copyrighted musical compositions against infringement by public performance for profit and to give users ready access to a substantial repertoire of music for such purposes that the Society was organized."

B. COOPERATIVE LICENSING IS NECESSARY BECAUSE OF DIVIDED OWNERSHIP OF PERFORMING RIGHTS AND BECAUSE THE OWNERS OF THESE RIGHTS RESIDE AT POINTS FAR DISTANT FROM THE PLACES WHERE PERFORMANCES OF THEIR WORKS ARE GIVEN.

Publishers were made members of the Society because as a rule the copyrights are in their names (R. I, 213-4). Some contracts between the more important writers and their publishers merely give the publisher publication rights (See Pl. Dep. Ex. 19, R. II, 1019, 682; Pl. Dep. Ex. 21-E, R. 1029, 683); others add mechanical rights (See Pl. Dep. Ex. 20, R. II, 1023, 1025, 682). Victor Herbert always reserved all performing rights to himself, and retained a reversionary interest as to all rights in the event of the publisher's bankruptcy (Pl. Dep. Exs. 19, 20, 21-E, R. II, 1019-1023, 682; 1023-27, 682; 1029-35, 683).

Generally the publisher obtains the right to secure copyright, but in such cases the performing rights of the composer and author are protected by the "Standard Uniform Popular Songwriter's contract" which contains a provision that the contract is "subject to any existing agreements between all of the parties hereto and the American Society of Composers, Authors and Publishers" (Pl. Dep. Ex. 3, R. II, 797-8, 523).

There are members of the Society in 31 of the States, 545 residing in New York, 197 in California, 46 in Illinois, 35 in New Jersey, 29 in Massachusetts, 25 in Pennsylvania, 15 in Ohio and Connecticut, and smaller numbers in Alabama, Colorado, Florida, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nebraska, New Mexico, North Carolina, South Carolina, Tennessee, Texas, Virginia, Washington, Wisconsin, Washington, D. C. and Territory of Hawaii (List of Members, R. II, 924-67). Only one member resides in Nebraska (R. II, 930).

Obviously these members have no means of ascertaining the fugitive and fleeting performances of their works in more than 32,000 establishments in the forty-eight states except through such an organization as the Society.

III. How the Society functions.

The Society is managed by a board of twenty-four directors, twelve of whom are composer-author-members and twelve publisher-members selected as provided in its Articles of Association (R. I, 51-6, 330-2). Agreements between the Society and users are arrived at in negotiations between the management of the Society and committees representing users, the management of the Society being subject to the jurisdiction of the Board of Directors of the Society (R. I, 230).

Eligibility for membership of a composer in the Society depends upon his having written and regularly published at least five of his compositions; eligibility of a publisher depends upon his having been regularly engaged in the music publishing business for a period of not less than one year (R. I, 47). Each member of the Society executes an agreement in the form of Exhibits "B" and "C" annexed to the complaint; all expired on December 1, 1940, and are automatically renewable thereafter (R. I, 37-45, 183, Pl. Dep. Exs. 1, 2, 6, 14, 31, 33, R. II, 797-804).

The Society has reciprocal agreements with similar societies serving the same function in foreign countries; the agreement with the British Society is typical (Pl. Ex. 15, R. II, 806-13, 184). The reciprocal payments under these agreements are set forth in Plaintiffs' Exhibit 36, R. II, 833; R. I, 254.

Part of the royalties received by the Society from licensees are devoted to giving financial aid to members of the Society, their widows, infant children or indigent parents (Articles of Association, Sec. 7, R. I, 69-70).

The net license fees remaining after deducting operating costs ranging from seventeen to twenty per cent., are divided into two equal funds which are distributed to members every three months; one such fund is placed at the disposal of the publishers' classification committee, and the other at the disposal of the writers' classification committee; each of these groups classifies its own members on the basis of profits and the popularity of their respective works, the number of performances of which the Society

has records, etc. (R. I, 501-2). The publishers are not concerned with the manner in which the writers distribute their royalties; nor do the writers have anything to do with distribution of the publishers' fund (R. II, 794-5).

Payment on the basis of each individual performance is admittedly impossible (R. I, 203).

Obviously the contribution of the several members of the Society varies. The novice with five compositions to his credit can hardly be placed in the same class with the seasoned writer whose works number in the hundreds and who has won public acclaim by the perennial appeal of his works. Writers in the latter class include the late Victor Herbert whose estate is represented in the Society by his daughter (appellee Ella Herbert Bartlett) and her brother Clifford Herbert (R. II, 680-705; Pl. Dep. Exs. 22, 23, 24, 25, 26, 27, R. II, 1037-45, 685-7); appellee Deems Taylor (Pl. Ex. 41, R. II, 851, R. I, 299-300); the late Ethelbert Nevin whose estate is represented in the Society by his widow, the appellee Anne Paul Nevin (R. I, 345-52; R. II, 1047-52, 897); and the witnesses, Irving Caesar (R. II, 611-36; Pl. Dep. Ex. 13, R. II, 1017, 611); Edgar Leslie (R. II, 739-763; Pl. Dep. Ex. 29, R. II, 1046, 744); George W. Meyer (R. II, 661-679; Pl. Dep. Ex. 18, R. II, 1017-18, 662); Jerome Kern (R. II, 764-77; Pl. Dep. Ex. 1, R. II, 1014-5, 764); Sigmund Romberg (R. II, 777-785, Pl. Dep. Ex. 4, R. II, 1015-6, 778); Gene Buck (R. I, 168-224; Pl. Tr. Ex. 1, R. II, 805, R. I, 169).

IV. The blanket license is the only feasible method of licensing the "small right."

A. IT IS IMPOSSIBLE TO ASSIGN IN ADVANCE A SEPARATE PRICE FOR EACH PERFORMANCE OF SPECIFIED COMPOSITIONS; NOR IS IT POSSIBLE TO BARGAIN SEPARATELY FOR EACH USE. THE BLANKET LICENSE OVERCOMES THESE OBSTACLES.

There are two possible methods of licensing performing rights; one is on a basis of the separate licensing of each composition for each separate performance; the other is a blanket license which permits the licensee to perform any composition in the licensor's repertoire without designat-

ing specific compositions in advance of the performance or securing separate licenses therefor. The Society's licenses have been issued on a blanket basis because no other feasible and practical method of licensing the small performing rights has ever been devised, although possible alternatives have been vaguely suggested but not described by the broadcasters from time to time (R. I, 256-7).

The Society issues its license to more than 30,800 establishments annually (Pl. Tr. Ex. 21, R. II, 818-A, R. I, 198). In a single year, there are more than sixty-five million performances of musical compositions in these establishments (R. I, 203). This figure is extremely conservative. There are 700 broadcasting stations in the United States, of which 70 are connected with churches and universities and have a free license from the Society (R. I, 199). The three radio networks and twenty-five of the 700 broadcasting stations in the United States picked at random, had 2,630,000 performances in 18,000 programs for a three-month period in 1939 (R. I, 309). Thus these stations alone had more than 10,500,000 performances that year.

The number of performances annually by the 30,000 non-radio licensees may be gauged by the fact that dance halls giving a three-hour program perform 30 compositions in a single evening (R. I, 336). Taking that as an average, almost a million compositions are performed in a single evening by users other than radio. This system eliminates the necessity of the Society's checking on each performance and eliminates the necessity of the licensee's keeping a record of, and reporting to the Society, each separate use; indeed a system based on payment for individual uses would necessitate an expenditure of three times the present cost (R. I, 256-7). These establishments do not keep a log or record of every separate performance (R. I, 337-8, 344); nor do broadcasters concern themselves with the ownership of any copyrights of the compositions broadcast (R. I, 460). The Society does not check the uses in such establishments except for check-ups on certain network programs. If there were no blanket licenses it would be necessary to check each performance in each establishment. It is impossible to check all uses of copyrighted

works unless a person skilled in music is present continuously at all places where music is being performed publicly for profit. This would be very costly if the Society were required to have investigators stationed at each of the 30,800 establishments now having a blanket license. Such economic waste is obviated by the blanket license. It also makes it possible for users to satisfy their patrons by performing *any* composition that such patron may request (R. I, 336, 344), enabling them to do so at a moment's notice.

The alternative to issuing blanket licenses would be a system of licensing each composition separately for each performance. Such a system is completely unworkable for a user who makes any substantial or extensive use of music, and would result in a destruction of the right of public performance for profit of copyrighted musical compositions. It is impossible to fix a price in advance which would fairly compensate the author or constitute a fair measure of payment to the user because each use differs from every other use and because it is impossible to set up machinery that will enable either the user or the creator to bargain on the basis of each separate use.

Dr. Sigmund Spaeth, a composer of musical works, a writer of books and a radio commentator (R. I, 471-2), testified that in fixing a price for a performance of his works, it would be necessary to take into consideration the profit likely to be made by the user, the size and importance of the establishment concerned, the elaborateness or complicity of the production, the size of the potential audience, and lastly, the possible effect upon his own returns in other ways from that same territory (R. I, 482).

Similar testimony as to the impossibility of fixing a price for performances in advance was given by witnesses Jerome Kern, the author of many famous dramatico-musical works (R. II, 771-2); Irving Caesar, a composer of numerous popular songs (R. II, 618); Sigmund Romberg, a composer of many famous operettas (R. II, 781); George W. Meyer, a popular composer (R. II, 666). Mrs. Anne Paul Nevin, the widow of the famous composer, Ethelbert

Nevin, testified that she had no sufficient experience that would enable her to place a price on each composition (R. I, 349) and Ella Herbert Bartlett, daughter of the late Victor Herbert, testified similarly (R. II, 694-5) as did Will Von Tilzer, a publisher of musical compositions (R. II, 709-11).

Walter S. Fischer, President of plaintiff Carl Fischer, Inc., publishers of all kinds of music except popular music (R. I, 569), testified that he has no agent in the State of Nebraska and sells copies of his compositions to jobbers who in turn sell to music stores in Nebraska (R. I, 580; see also R. II, 717). Some sales are made directly by his company to such music stores (R. I, 580). To attempt compliance with this Statute, it would therefore be necessary to print separate compositions for sale and distribution in the State of Nebraska; moreover, it would be impossible for a publisher to sell to jobbers who in turn sell copies of compositions throughout the country. The publisher has no means of compelling the jobbers to affix a price or to collect performance fees (R. II, 645, R. I, 540). There is not enough space on a sheet of music to cover all the various possibilities that would enter into fixing a price for the performance (R. I, 580-1). It is impossible as a practical matter, to fix such a price and to check on performances to see that performances were given only from compositions purchased in the State of Nebraska upon which a price for performances had been paid (R. I, 535-9, 580-3; see also R. II, 645-9, 617-21).

Neither composers nor publishers have any control over mechanical records or rolls. They may not affix a price upon them nor may they regulate the manner or place of their sale (R. I, 578-9, 490, 528-9, 538; R. II, 746). Nor could they compel the manufacturers of mechanical records and rolls to pay them any performing fee (R. I, 579, 529; R. II, 621, 708, 773, 780).

The value of a song fluctuates from time to time; there is no way of knowing what constitutes a fair price for performances and other uses when a song is first published (R. II, 621; R. I, 581-2). Television is a public per-

forming right which will shortly be on a commercial footing, but it is impossible to determine at this time a price for such right or to affix such a price (R. I, 587; R. II, 621, 716, 773, 782).

Through this system of blanket licensing, a feasible method has been adopted under which all users may have ready access to a vast number of copyrighted musical compositions at a minimum of expense, without any interruption to their entertainment, and with little risk of infringing copyrighted works.

The license fees paid are in most cases less than the cost of a bookkeeping system. The additional cost to radio broadcasting stations, if they were to operate on a per piece plan, is apparent when one considers that it would require four additional auditors in each station to keep track of the transcriptions used for a period of slightly more than an hour each day (R. I, 412-3).

The Society furnishes to all of its 30,800 licensees a list of its members "to enable all concerned to readily ascertain if the performing rights in a certain composition are embraced under the ASCAP license * * * " (Pl. Tr. Ex. 4, R. II, 788). It is a simple matter for a user to inspect the sheet music where the names of the publisher and writer are listed and if the name of a publisher or writer therein listed appears upon the membership list which is furnished to the user, such work may be used under the Society's license (R. I, 216).*

Practically all licensing of this kind, whether by the Society or by other organizations, is conducted on a blanket license basis. For example: SESAC (Society of European

* Occasionally users demand a catalogue of all compositions in the Society's repertoire—not for the purpose of securing licenses to play those compositions, but rather allegedly to *avoid* using those compositions (Def. Ex. 51, R. II, 793-4). It is significant that the user making the demand had never been sued for infringement by anyone in fifteen years, that it was admittedly unnecessary to use such a catalogue for a hotel having the Society's license, and that the suggestion to demand such a catalogue emanated from counsel for appellants in the case at bar, rather than from the user (R. I, 449-50).

Stage Authors and Composers) controlling an extensive catalogue of publishers who are copyright owners, likewise issues blanket licenses to broadcasters (Pl. Tr. Ex. 64, R. II, 867, R. I, 470).

The National Broadcasting Company furnishes its transcription services to radio broadcasting stations at flat fees, regardless of the use made of such transcriptions (R. I, 417-8).

The British Performing Right Society which "controls the performing rights in more than a million musical works," likewise grants to users "general licenses to perform all or any of the works under its control . . . at an inclusive fee." *Performing Right Society v. Theatre of Varieties*, [1924] A. C. 1; 93 L. J. (K. B.) 33, 35.

If this Statute or any part of it, were to be upheld and the users should thus succeed in destroying the Society, they would continue to insist upon a *blanket* basis of dealing by buying the entire catalogue of individual publishers (R. I, 414, 432, 439-40). Incidentally, it is significant that the broadcasters intend to ignore the composers and authors completely and to buy rights solely from the publishers if the State Statute should be upheld, and the Society destroyed in consequence.

B. THE BLANKET LICENSE ENABLES THE SOCIETY TO ISSUE LICENSES AT A VERY LOW COST TO THE USER.

It is not suggested that appellees charge exorbitant fees; indeed the average annual license fee paid to the Society by users of music in Nebraska for the right to perform publicly for profit the copyrighted compositions of approximately 46,000 composers (some users in Nebraska pay as low a fee as \$30. per year) demonstrates that the Society is most reasonable in the matter of charges (R. I, 213). The schedule of annual license fees (as of the year 1938) was as follows (Finding No. "5", R. I, 134-5; Pl. Tr. Ex. 17, R. II, 815; R. I, 186):

250 motion picture theatres paid annual fees totalling \$12,701.20, or an average of \$50.80 annually;

- 107 dance halls and miscellaneous establishments paid annual fees totalling \$4,549.35, or an average of \$42.52 annually;
- 24 hotels and restaurants paid annual fees totalling \$2,826.30, or an average of \$117.76 annually;
- 10 radio broadcasting stations paid annual fees totalling \$45,712.69, or an average of \$4,871.27 annually.*

It is interesting to compare the provision of the Copyright Law which imposes minimum damages of \$250 for the unauthorized performance of a single copyrighted composition (Tit. 17, U. S. C., § 25; *Jewell-LaSalle Realty Co. v. Buck*, 283 U. S. 202) with the above schedule of license fees showing that in most cases motion picture theatres, dance halls, hotels and similar establishments pay the Society much less than \$250 *annually* for the privilege of performing all the copyrighted works in the Society's repertoire.

During a fourteen-year period from 1926 to 1939, the Society was compelled to bring ninety-five infringement suits in Nebraska (Pl. Tr. Ex. 62, R. II, 861-6, R. I, 467). That exhibit shows that most of the suits were disposed of for nominal sums (in the vast majority of cases for substantially less than \$100), the defendant thereupon taking a license so that his performances thereafter were lawful. In most cases where no license was taken, the judgment recovered was uncollectible because the defendant had disappeared, or was execution proof, as shown by such exhibit.

The necessity for instituting this number of suits in Nebraska is readily apparent when viewed in the light of

* The net revenue of the 10 broadcasting stations in Nebraska from sales of time on the air in 1935 was \$510,000 (R. I, 240). During that year, license fees paid by those stations to the Society were \$34,165.32 (Pl. Tr. Ex. 17, R. II, 815; R. I, 186).

In 1937, the net sales of time on the air had almost doubled, being \$1,096,369 (Pl. Tr. Ex. 29, R. II, 821; R. I, 241). Yet the license fees paid to the Society by such stations for the year 1937 had risen only to \$43,712.70 (Pl. Tr. Ex. 17, R. II, 815).

the refusal of all the hotels in Nebraska to pay any license fees prior to 1921 (R. II, 917). In other words, as the court below found, a number of users refuse to respect the rights of copyright owners until investigations are made, infringements ascertained, and suits brought (Finding "13", R. I, 137). The exhibit shows that the Society does not collect the \$250 minimum damages permitted under the Copyright Act.

Station WOW of Omaha, Nebraska, pays a blanket annual fee of \$9,100 to the National Broadcasting Company (known as NBC) for the privilege of using as much or as little of its transcription service as it desires (R. I, 417-8). WOW uses only one hour and five minutes of such transcriptions each day (R. I, 413). WOW also receives from NBC a blanket license to use sustaining programs, in return for which WOW gives NBC sixteen free hours of time on station WOW for each 28-day period (Deft's. Tr. Ex. 45, R. II, 870; R. I, 397). This is equivalent to a payment of \$60,000 annually for this service (R. I, 424).

WOW pays its musicians \$29,000 per annum for one and one-half hours of music each day that originates in its own studios (R. I, 395). WOW's gross business amounts to \$470,000 annually (R. I, 410). Of this amount it pays 15% or \$70,000 to the advertising agencies who act as intermediaries between the sponsors and the broadcasting station (R. I, 410-11). NBC supplies WOW with commercial programs for twelve out of its nineteen hours of operation (R. I, 425). Four hours of this are devoted exclusively to music (R. I, 414). Two hours and twenty minutes are devoted to musical transcriptions and live performances originating in its own station, thus having six and one-third hours of its nineteen hours of operation devoted to music. The musical programs are much more valuable than non-musical programs. This is illustrated by the fact that a short advertising talk of one hundred words, called a "spot announcement," costs the advertiser \$15 when interposed between two *dramatic* programs, but cost \$25 when interposed between two *musi-*

cal programs (R. I, 427). WOW claims that 85% of certain of its musical programs are devoted to the Society's music (R. I, 393). It cannot tell accurately because it does not keep a record of the compositions performed on its stations (R. I, 393, 397, 400, 416-7, 434).

For the license which the Society gives to WOW it receives annually \$22,800 (R. I, 410).

Although the Society's rates have been fair and non-discriminatory, certain users have for many years refused to pay any license fees to the Society or its members until after investigations were made by the Society, infringements ascertained, and suits brought. The court below found (R. I, 137):

"13. The Society's practice has been to grant blanket licenses to theatres according to their seating capacity, to radio broadcasting stations according to their income, power and coverage, and to hotels, cabarets and dance halls according to their respective size, business done, number and size of orchestras, methods of performance, income and standing. Certain of such users have for many years consistently refused to pay license fees to the Society or its members, until investigations were made by the Society, infringements ascertained and suits brought."

V. The right to restrict non-dramatic performances of certain compositions must be reserved in order to protect dramatic rights.

Certain compositions which are integral parts of stage plays or motion pictures, are often placed on a restricted list by members of the Society in order to limit the number of performances of such compositions on the radio because repetitious and indiscriminate performances of such compositions destroy the value of the stage play or motion picture of which they are a part and in which very large sums are invested (R. I, 255, 318, 545-6; R. II, 640-2, 775, 779). Members are required to act in good faith in exercising this right (Ex. "B," annexed to Compl., R. I, 38).

In the field of serious music, composers restrict their works in order to have such works introduced by reputable artists who refuse to render a new work if it is being performed by lesser artists at the same time (R. I, 577).

The "small right" or non-dramatic right which these statutes primarily affect, is only one of the many rights granted under the Copyright Act. Each right may be vested in separate owners or groups of owners. The author owes a duty to the owners of other rights not to so use the small rights as to destroy other rights which the author has bargained away.

Jerome Kern, a composer of musical comedies and light operas such as "Show Boat," "Sally," "Sonny," "The Cat and the Fiddle," "Music in the Air," and many others (R. II, 764-7), summed up the situation as follows (R. II, 775):

"A. My compositions have been, as I testified before, written for stage productions. While production is running both in big cities and on tour, it is desirable to prevent others from performing these compositions, because such performance would be in competition with the particular stage production, and would destroy the commercial value of such production. Therefore, I have invariably restricted the public performance of my compositions until these compositions and the plays in which they appeared have run their course. That is true with all production writers. To permit these compositions to be performed indiscriminately for profit would jeopardize the commercial value of the compositions and the stage productions in which they were performed and for which they were written. For that reason I cannot and will not determine and fix a price to be charged for the public performance for profit of my compositions at the time of the publication of these compositions. Many a composition is published that has no value at all from a viewpoint of sheet music sales. Its chief and most often its only value is for the stage production performance or the grand right. These compositions are always restricted by me and by my publisher."

VI. The Society is the author's sole means of protection against the piracy of his copyrighted works in the field of public performance for profit.

The Society has continuously functioned since 1914, solely for the purpose of doing for its members what they cannot do for themselves individually, namely, licensing the right of public performance for profit upon fair and reasonable license fees, and protecting them against infringement of their copyrights; *at no time has it dealt in any commodity; it has not dealt in sheet music, nor exercised any functions with respect to mechanical rights of reproduction* (R. I, 184).

Anything which destroys cooperative societies of authors will restore the situation existing in 1914 when no author received any royalties from the performances of his musical compositions and when infringement was the rule rather than the exception. Most of the Society's licensees were wilful infringers of all copyrighted works before the Society apprehended them. Prior to 1914 users never voluntarily requested a license (R. I, 174). They still do not pay any attention to the copyright status of the works they use (R. I, 375-6, 397, 400, 416-17, 434). Yet they have never been sued for infringement by any unorganized composer, author or publisher (R. I, 375). They feel that they will enjoy complete exemption from the operation of the copyright laws if the Society is destroyed (R. I, 374).

It is submitted that the State Statute was enacted for the purpose of destroying the only effective means of obtaining any remuneration from the licensing of the right of public performance for profit. This right is the only valuable right now left to both author and publisher in view of the diminishing returns from sales of sheet music and phonograph records on which authors and publishers formerly depended for their livelihood.* The

* Prior to the time that radio became popular, many of the "hit" songs sold from 1,000,000 to 3,000,000 copies (Pl. Tr. Ex. 20, R. II, 816, 740-3). Today 200,000 to 300,000 copies are considered good (R. II, 613-4, 740-3).

income from those sources has been reduced as much as 70 to 90%. (Pl. Tr. Ex. 22, R. I, 198; R. II, 819; R. I, 194-5, 305-6, 479-81, 532; R. II, 662-4, 667-8, 711-14, 740-3, 775-6). Indeed, the main source of an author's income today is the amount he derives through the Society from the licensing of the right of public performance for profit (R. I, 347, 349-50; R. II, 667-8, 672, 691-2, 751). The same applies to publishers, with the additional fact that the cost of publishing music has increased tremendously in the meantime (R. I, 306-10, 589; R. II, 714-5, 718-20).

VII. Organized efforts to destroy appellee Society as means of securing free use of right of public performance for profit.

The broadcasters, hotel owners, motion picture theatre operators and other users have always presented a united front in negotiating for music through their respective national organizations (R. I, 175, 211, 223-4, 271-2, 406-410).

Organized resistance to the Society's activities has always had as its sole object the destruction of the right of public performance for profit, so that users might have the same *free* access to the copyrighted musical compositions of members of the Society that they enjoyed before 1914. Among the schemes for accomplishing this end have been attacks on the Society as an alleged monopoly, interposed as defenses to suits for infringement,¹ bringing a suit against the Society in the New York State Courts, claiming that the Society operated in restraint of trade,² filing com-

¹ See, e.g., *Harms v. Cohen*, 279 Fed. 276, 280 (E. D. Pa., 1922); *Buck v. Hillsgrove Country Club, Inc.*, 17 F. Supp. 643 (D. C. R. I.).

² An application for injunction against the Society brought by the Motion Picture Exhibitors League of America to restrain the Society's activities on the ground that it was an alleged monopoly, was denied in *174th Street & St. Nicholas Ave. Amusement Co. v. Mariwell*, 169 N. Y. Supp. 895 (1918).

plaints with the Federal Trade Commission,³ and introducing numerous bills in Congress seeking to amend the Copyright Act so as to permit the users of music to perform publicly for profit the compositions of the Society's members without compensation (R. I, 176-181).⁴

Appellees have been compelled to establish in many litigations that the rights given to copyright proprietors to publicly perform for profit musical compositions, covered various situations in which an attempt was made to publicly perform the musical compositions for profit without paying anything therefor to the copyright proprietors.

In *Herbert v. Shanley Co.* (229 Fed. 340), and *John Church Co. v. Hilliard Hotel Co.* (221 Fed. 229), the Cir-

³ Charges against the Society before the Federal Trade Commission were dismissed in 1923 (R. I, 231-2).

⁴ The following Bills were introduced in Congress, having as their object the amendment of the Copyright Law so as to destroy the right of public performance for profit as applied to copyrighted musical compositions, some of the bills seeking to enact legislation in many respects similar to the state statute:

68th Congress, 1st Session: H. R. 713 (Dec. 5, 1923); H. R. 6250 (Jan. 26, 1924); S. 2600 (Feb. 22, 1924); S. 3078 (April 10, 1924); H. R. 8685 (Apr. 15, 1924); H. R. 8734 (Apr. 17, 1924);

69th Congress, 1st Session: S. 2328 (Jan. 7, 1926); S. 2811 (Jan. 16, 1926); H. R. 11209 (Apr. 12, 1926);

70th Congress, 1st Session: S. 4467 (May 3, 1928);

71st Congress, 1st Session: S. 1386 (June 4, 1929);

71st Congress, 3rd Session: S. 5687 (Jan. 5, 1931);

72nd Congress, 1st Session: H. R. 10364 (Mar. 10, 1932);

H. R. 10740 (Mar. 22, 1932); H. R. 10976 (Mar. 30, 1932); H. R. 11948 (May 7, 1932); S. 1035 (Dec. 9, 1931); S. 3985 (Mar. 2, 1932);

73rd Congress, 1st Session: S. 342 (Mar. 13, 1933);

74th Congress, 1st Session: S. 2465 (Mar. 13, 1935); S. 3047 (August 12, 1935);

75th Congress, 1st Session: S. 7 (Jan. 6, 1937); H. R. 2695 (Jan. 12, 1937); S. 2031 (Mar. 29, 1937); H. R. 10633 (May 16, 1938).

cuit Court of Appeals for the Second Circuit held that the rendition of a copyrighted musical composition by a hotel orchestra and by professional singers accompanied by an orchestra, respectively, where no separate charge was made for the music, did not constitute a public performance for profit within the meaning of the Act. These decisions, however, were *reversed* by this Court (242 U. S. 591), where it was said (p. 594):

“If the rights under the copyright are infringed only by a performance where money is taken at the door, they are very imperfectly protected. * * * It is enough to say that there is no need to construe the statute so narrowly.”

The effort of moving picture theatre proprietors to escape the charge of infringement when *parts* of copyrighted musical compositions were played by orchestras, organs or other musical instruments during the showing of moving pictures, and where no separate charge was made for the music, was met by several adverse decisions. *Harms v. Cohen*, 279 Fed. 276 (E. D. Pa.); *Pastime Amusement Co. v. M. Witmark & Sons*, 2 F. (2d) 1020 (C. C. A. 4), *aff'g* 298 Fed. 470 (1924); *Irving Berlin, Inc. v. Daigle*, 31 Fed. (2d) 832 (1929, C. C. A. 5).

In numerous cases against owners of dance-halls, hotels, theatres and other establishments, it was necessary to overcome the defense that the orchestra was an independent contractor, and that the owner of the establishment had no control over the compositions performed. *Waterson, Berlin & Snyder Co. v. Tollefson*, 253 Fed. 859 (S. D. Calif.); *Harms v. Cohen*, 279 Fed. 276 (E. D. Pa.); *Witmark v. Bamberger*, 291 Fed. 776 (D. C. N. J.); *Witmark v. Pastime*, 298 Fed. 470, *aff'd* 2 F. (2d) 1020 (C. C. A. 4); *M. Witmark & Sons v. Calloway*, 22 F. (2d) 412 (E. D. Tenn.); *Dreamland Ballroom, Inc. v. Shapiro*, 36 F. (2d) 354 (C. C. A. 7); *Berlin v. Daigle*, 31 F. (2d) 832 (C. C. A. 5); *Buck v. Della Russo*, 25 F. Supp. 317 (D. C.

Mass.); *Buck v. Dacier*, 26 F. Supp. 37 (D. C. Mass.); *Buck v. Crescent Gardens*, 28 F. Supp. 576 (D. C. Mass.). See claim of hotel in Nebraska as recently as 1939 (Dfts. Tr. Ex. 51, R. II, 793, R. I, 448-50). The same defenses have also been unsuccessfully interposed abroad. *Performing Right Society v. Mitchell*, 131 L. T. 243 (1924); *Canadian Performing Right Society v. Famous Players*, 140 L. T. 657.

In many cases performances by a phonograph record or perforated music roll upon a player piano were held to constitute "public performances for profit". *M. Witmark & Sons v. Calloway*, 22 F. (2d) 412 (E. D. Tenn.); *Buck v. Lester*, 24 F. (2d) 877 (E. D. S. C.); *Buck v. Heretis*, 24 F. (2d) 876 (E. D. S. C.); *Berlin v. Daigle*, 31 F. (2d) 832 (C. C. A. 5); *Lutz v. Buck*, 40 F. (2d) 501 (C. C. A. 5), cert. den. 282 U. S. 880.

Finally, this Court in *Buck v. Jewell-LaSalle Realty Company*, 283 U. S. 191, established that the re-broadcasting by hotels or other public places of musical compositions which had been broadcast by radio, was within the protection of the Copyright Act. It had been previously held in a number of cases that broadcasting by radio of the rendition of a copyrighted musical composition constituted an infringement of the copyright.⁵

All these attempts to deprive appellees and others similarly situated of rights granted to them by Congress having failed, the users conceived the idea of nullifying these

⁵ *M. Witmark & Sons v. Bamberger*, 291 Fed. 776 (D. C. N. J.); *Remick v. General Electric Co.*, 4 F. (2d) 160 (D. C. S. D. N. Y.); *Remick v. American Automobile Accessories Co.*, 5 F. (2d) 411 (C. C. A. 6), reversing the District Court for the Southern District of Ohio; cert. den. 269 U. S. 556; *Remick v. General Electric Company*, 16 F. (2d) 829 (D. C. S. D. N. Y.). Cases in other countries are in accord: *Messenger v. British Broadcasting Company, Ltd.*, [1927] 2 K. B. 543; same case on appeal [1928] 1 K. B. 660 (Court of Appeal), [1929] A. C. 151 (House of Lords); *Performing Right Society v. Hammond's Bradford Brewery Co.*, [1934] ch. 121; *Chappell & Co. Ltd. v. Associated Radio Co. of Australia*, 50 Victorian Law Rep., 350 (1925), (Sup. Ct., Victoria).

rights through state legislation (R. I, 180-2, 373-4).⁶ A Louisiana statute enacted in 1934 imposed confiscatory taxes upon the Society (Act No. 137 of La., 1934). This was held invalid in *State v. Lucas*, 199 So. 126 (Sup. Ct. La., 1940, printed at p. 154 of Appendix herewith submitted).

In an action brought in 1935 by the Attorney General of the Superior Court of the State of Washington alleging the Society to be a monopoly, Judge WRIGHT dismissed the suit and held the Society to be a beneficent organization (Appendix, pp. 156-9). In 1937, statutes substantially along the lines of the State Statute were passed in Florida, Washington and Tennessee. (These statutes are all printed in the Appendix.) A Montana statute enacted in 1937 (see *Carl Fischer, Inc. v. Shannon*, 26 F. Supp. 727) was recently repealed (H. B. No. 188, enacted February 26, 1941). A similar bill, passed by the Michigan legislature, was vetoed by Governor (now Mr. Justice) MURPHY on July 27, 1937. Copies of the veto message were handed to this Court on the argument of the appeal in *Gibbs v. Buck*, 307 U. S. 66.

The users of music very frankly stated that their purpose in passing these statutes was to avoid the obligation of paying for public performances for profit of copyrighted music, the proponents of the State Statute having urged all users in Nebraska to get in touch with their legislators to have the Statute passed for the following purposes (Pl. Tr. Ex. 44, R. II, 853, R. I, 374):

"Our first big problem is the promotion of the bill 478, which will protect us against the payment of the so-called license to play copyrighted music at public performances for profit. We have been forced to pay the American Society of Composers, Authors and Publishers long enough and we believe that if we all do our part, we will be able to keep this graft out of the state of Nebraska."

⁶ The bills introduced in 35 state legislatures are enumerated in Cohn, *Music, Radio Broadcasters and the Sherman Act*, 29 Georgetown L. J. 407, 416-9 (1941).

VIII. The Society controls only a small part of available music.

The amount of copyrighted music is infinitesimal when compared with the entire amount of music available for which no payment whatsoever need be made to the creators or publishers of the works (R. I, 248-54, 260, 300-305, 428-9, 501-2). This is known as the public domain. In many cases new popular arrangements are made of this old public domain music (R. I, 301-2, 437).

The Victor Record Company, which is owned by the Radio Corporation of America (the parent of the National Broadcasting Company), has a catalogue of 900,000 compositions in the public domain (R. I, 300-301). The American Record Company, which is owned by the Columbia Broadcasting System, likewise has a very extensive public domain catalogue (R. I, 303). So extensive is the field of music outside the repertoire of the Society that the Radio Corporation of America for a time operated Station WJZ and other stations without utilizing the works of the Society (R. I, 177).

The broadcasters have recently organized a corporation known as Broadcast Music, Inc. for the purpose of enabling the broadcasters to operate without access to the Society's license (R. I, 249, 430-31).⁷

Although the record does not disclose the fact, we believe the Court may take judicial notice of the refusal of the radio networks and their affiliated stations to obtain a license from, or to broadcast, any compositions in the repertoire of the Society since January 1, 1941.

⁷ Consent decrees were recently signed by both the Society and Broadcast Music, Inc., in *United States v. Broadcast Music, Inc.* (Civil Action No. 459, E. D. Wis., decree entered Feb. 3, 1941); *United States v. American Society of Composers, Authors and Publishers* (Civil Action No. 13-95, S. D. N. Y., decree entered March 4, 1941). The latter decree is hereinafter referred to and described (*infra*, p. 62).

In addition to the public domain music and the music of the Broadcast Music, Inc., there are a great many large catalogues available to broadcasters, including Langlois & Wentworth (R. I, 303-4, 432; Pl. Tr. Ex. 35, R. II, 832, admitted R. I, 250), Schubert Publishing Company, Bright, Coff & Hartell, Universal Edition, Associated Music Publishers, G. Ricordi of Milan (R. I, 303-4).

In addition, there are several other licensing agencies such as the Society of European Stage Authors and Composers, known as SESAC, Davis & Schwegler and the Society of Jewish Composers and Authors (R. I, 252-3, 304) in addition to a great many other music publishers in the United States who are not members of the Society (Pl. Tr. Ex. 37, R. II, 791, R. I, 297).

IX. The State Statute.

The court below held that the State Statute was unconstitutional in its entirety because its purpose and effect was to deprive appellees of rights granted to them under the Federal Copyright Act. In accomplishing this purpose, the Statute *also* ran afoul of the equal protection clause and the due process clause of the Federal Constitution.

The State Statute has two unmistakable objects, one, to deprive composers, authors and publishers of copyrighted musical works of the only means of protecting themselves against infringement by public performances for profit, and secondly, to attain all who endeavor to exercise such rights, however remote their conduct may be from any possible charge of illegality. A brief enumeration of the provisions of the Statute will show the surprising lengths to which it goes in deterring copyright owners from exercising their rights in the State of Nebraska.

(1) It is unlawful for composers, authors or publishers or assigns of copyrighted musical compositions to form any society or other entity or group when the members therein constitute a substantial number of the persons

"within this State or *outside* thereof" owning or controlling "*copyrighted* vocal or instrumental musical compositions", and when one of the objects of such group is the determination and fixation of license fees required for itself or its members for any use or rendition of copyrighted musical compositions for private or public performance for profit. Such a society is called a "combination" and is "declared to be an unlawful monopoly in this State (Nebraska)"; and such "fixing of prices," and the collection or attempting to collect such license fee is "declared illegal and in restraint of trade", and is "declared to be an illegal *intra*-state transaction within this State and shall be subject to the terms and penalties of this Act" (Sec. 1).

The purpose of the legislature in enacting this statute is best exemplified by the last sentence of Section 1 which establishes *prima facie* guilt merely by showing that "a substantial number of all authors, composers, proprietors, publishers, owners or their heirs, successors or assigns of copyrighted vocal or instrumental musical compositions in the United States, are shown to be members of any society, association, club, firm, partnership, corporation, group or entity."

It will be shown that the practical effect of this section of the Statute is to make it impossible for American composers and authors to license the performing rights in their musical works on a cooperative basis under a so-called "blanket license" in a field where destruction of the cooperative enterprise means the surrender of the right of public performance for profit granted to them pursuant to the Federal Copyright Act.

Inasmuch as the Statute does not condemn any combination fixing license fees unless "the members therein constitute a substantial number of the persons, firms or corporations within the United States who own or control copyrighted vocal or instrumental musical compositions," broadcasters and other users who do not constitute a substantial number of persons who own or control copyrighted compositions, are permitted to form a corporation for the

purpose of doing the very things which a cooperative society of copyright owners is barred from doing. The radio broadcasters have organized a corporation known as Broadcast Music, Inc. for that very purpose (R. I, 249, 428-31).

(2) Copyright owners (whether members of a combination or not) are prohibited from permitting sheets of music or phonograph records of their works to be sold in the State of Nebraska unless such sheets of music or such records contain thereon in legible form a price independently determined and arrived at for all uses and purposes. Any purchaser paying the price, is given the full right of public performance for profit by himself or by such others as he may license to perform the same (Sec. 2-A).

The following Findings of the court below amply demonstrate the impossibility of complying with this Section (R. I, 137-8, Findings 16 and 19):

"16. Many thousand of the copyrighted musical compositions owned and published by complainants, as well as others similarly situated, have been recorded under the compulsory license provision of Section 1(e) of the Copyright Act by manufacturers of phonograph records, music rolls and electrical transcriptions. Such manufacturers have paid to copyright owners not more than two cents for each record and said copyright owners have no right to demand any further sums from such manufacturers; complainants and others similarly situated have no control over the sale or disposition of such phonograph records, music rolls or electrical transcriptions and they can not compel the manufacturers thereof to affix any price upon them or to collect a price for the public performance for profit thereof, or if collected, to remit or give to them the sums so collected respectively for the public performance for profit thereof. Such manufacturers have no right, title or interest in the public performance for profit of such copyrighted compositions."

"19. The Statute can not possibly be complied with because among other things, under their respective contracts with the authors and composers, the publisher-members of the Society (including publisher-complainants) have the right to and do give away and distribute free of charge, professional copies of the compositions copyrighted by said publisher-members within the State of Nebraska; this is a practice in the business and is done to create a desire for such compositions on the part of the public, make said compositions popular and give them commercial value."

(3) If no price is affixed for the several uses of the copyrighted work, the purchaser is free to use the same for public performances for profit free of all liability for copyright infringement. This prohibition applies whether the copyright owner acts as an individual or in combination with others (Sec. 2-B).

(4) Section 2-C provides that the purchaser of copies of such compositions may not resell, copy, print, publish or vend the composition.

This is an empty gesture in view of the present lack of substantial income from that source (Pl. Tr. Ex. 22, R. I, 198, R. II, 819; R. I, 194-5, 305-6, 479-81, 532; R. II, 662-4, 667-8, 711-14, 740-3, 775-6).

(5) All composers, authors and publishers of copyrighted works, whether or not members of any society or association condemned by Section 1 must file in the office of the Secretary of State a copy of each composition to be sold by them, upon which shall appear over the signature of each a statement to the effect "that he or it controls the sale or disposition of such composition" and provided further that a filing fee of twenty-five cents shall accompany each copy filed (Sec. 2-D).

(6) All of the Society's *existing* contracts are declared void and non-enforceable (Sec. 3).

(7) Owners of broadcasting stations in Nebraska are allowed to broadcast copyrighted compositions in the repertoire of the Society (which is "a combination declared unlawful by Section 1 hereof") without the payment of any license fee (Sec. 4-A).

(8) A similar exemption from any requirements to pay copyright royalties is given to owners of motion picture theatres and other places of public performance within the State for performances of copyrighted works when such performances are given by means of living performers or through such mechanical means as loud speakers, radio broadcasting and electrical transcriptions (Sec. 5-A).

(9) Owners of Nebraska radio broadcasting stations are permitted to rebroadcast copyrighted musical compositions originating or emanating from an affiliated station without the State. The out-of-State broadcaster is prohibited from charging the Nebraska broadcaster any license fee for the purpose of paying or repaying the same to the Society (Sec. 4-B).

(10) Persons supplying broadcasts, transcriptions, records, films or artists to owners of theatres in Nebraska for performances of copyrighted music, are prohibited from collecting any moneys from such Nebraska theatre owners for the purpose of reimbursing the out-of-State person for license fees paid by him to the Society (Sec. 5-B).

(11) All copyright owners, who are members of a condemned combination, are prohibited from suing any Nebraska broadcaster or theatre owner for infringement where the performance is given by means of broadcasts, records, films, electrical transcriptions or living performers brought into the State from outside the State.

Use of copyrighted compositions in this manner is declared to be "intrastate business of this state and subject

to the control, regulation and prohibitions set forth in this act notwithstanding that such copyrighted musical compositions originated or emanated from without this state" (Sec. 6).

The copyright owner in such cases, is allowed to assert his rights only as against the person outside the State who sends the broadcasts, records, films, electrical transcriptions or living performers into the State (Sec. 6).

(12) The Statute creates certain *irrebuttable presumptions* which bar appellees from establishing facts showing that their conduct is reasonable and lawful or that the State of Nebraska has no jurisdiction in respect of the acts complained of. The following provisions of the Statute are illustrative:

(a) If a substantial number of composers, authors or publishers of copyrighted works combine for the purpose of jointly licensing their works (the compositions of each being entirely different from the compositions of the other) and determine to grant a single license for their combined copyrighted works at a stipulated fee, they are deemed guilty of combining to restrain trade (Sec. 1).

Appellees are denied all opportunity to show that they do not in fact restrain trade, or that the combination is necessary as the only reasonable means of protecting and licensing the right of public performance for profit of their several copyrighted compositions. In this respect this Statute, which attempts to regulate activities of copyright owners, differs from the general anti-monopoly laws of Nebraska which permit defendants to show that they do not actually restrain trade or that their combination is reasonable.

In fact the Statute declares that a *prima facie* case shall be made out against such composers and authors merely upon proof that they are members of any society, association, group, firm, partnership, corporation, group or entity which consists of a substantial number of composers, authors, publishers or owners of copyrighted musical com-

positions regardless of the purpose of such organization (Sec. 1).

(b) All existing contracts between the Society and Nebraska users are *declared* to have been entered into as *intra-state* transactions and are declared invalid (Sec. 3).

(c) Any person outside the State of Nebraska who obtains a license to perform appellees' copyrighted works, and who sends performers or the instrumentalities from which performances may be given into Nebraska, and who attempts to collect license fees from Nebraska users for the purpose of reimbursing himself for payments made to appellees, is "declared to be an agent and representative" of appellees (Secs. 4-B and 5-B).

(d) The use or performance of copyrighted compositions by Nebraska broadcasters, theatre owners, etc., by means of receiving and re-broadcasting or reproducing performances by means of radio broadcasts, sound producing instrumentalities or apparatus, or electrical transcription, or by living performers sent into the State from without the State "shall be considered for the purpose of this Act, as *intra-state* business of this State and subject to the control, regulation and prohibition set forth in this Act notwithstanding that such copyrighted musical compositions originated or emanated from without this State" (Sec. 6).

The statute then proceeds to regulate business transacted beyond its borders *as if* such business were transacted within the State.

(e) Anyone who acts as a representative of the Society in Nebraska, no matter how petty his function or how remote his representation is "deemed an official representative and agent of the Society," and the Society "shall be construed to be doing business within this State, and service of any process against such combination may be had upon such representative *or the agent of such representative as herein defined*". The legal effect of such service

of process is declared to be the same "as if served upon a duly elected officer or managing agent or other official representative upon whom service might *otherwise* be made upon such combination within this State" (Sec. 7-A).

(13) In order to discourage appellees from attempting to assert the exclusive rights granted to them under the Copyright Act, violation of the State Statute subjects violators to severe and unusual penalties and forfeitures of constitutional rights as follows:

(a) Violation of the statute carries a penalty of \$50 to \$5,000 or one to ten years imprisonment or both (Sec. 8).

(b) Collection of copyright royalties is deemed a separate offense from the combination (Sec. 1).

(c) All persons who negotiate, collect or attempt to collect license fees for the Society or who act as its representative or agent are declared to be part of the combination and are made subject to the penalties of the Statute, even though they do not participate in the combination (Sec. 7-B).

(d) If individual users in Nebraska sue for violation of the Statute they may recover attorneys' fees as well as damages (Sec. 10-A).

(e) If the defendants in any suit or proceeding fail to furnish evidence incriminating themselves they are subject to a fine of \$100 for each day that they fail to produce such evidence, notwithstanding that personal service may not have been made upon them (Secs. 11-A and 11-B). It is significant that if the information is provided it may be used for self-incrimination because the Statute does not grant immunity from prosecution based upon information so furnished.

(f) All penalties are made cumulative to all other rights, remedies and provisions under other Nebraska laws (Sec. 13).

The cumulative penalties referred to are those enumerated in the general Nebraska anti-trust laws (Comp. St. Neb. 1929, Art. 8, Ch. 59, Secs. 801, 802) which imposes *additional* penalties of not more than \$5,000 or imprisonment of one to ten years or both. Appellees are brought within said sections of Chapter 59 of the Compiled Laws by reason of Section 1 of the State Statute under which the Society (because of the nature of its organization) is "declared illegal and in restraint of trade."

(14) Jurisdiction to sue or prosecute under the Statute is vested in the Attorney General of the State and the several County Attorneys, and a receiver may be appointed (Sec. 9-A, B, C, D, 10-A); if such State officials fail to act upon request, any aggrieved individual may institute such civil proceedings as the State officials might have brought (Sec. 10-B).

(15) The Statute contains the usual separability clause (Sec. 12).

Summary of Argument.

For a summary of the argument, we refer the Court to the captions and sub-captions of the points hereinafter advanced. Any other summary within permissible bounds would be inadequate.

ARGUMENT.

I. The State Statute violates the copyright clause of the Federal Constitution.

The objections to the State Statute under the Copyright Clause are twofold: (1) it invades a field delegated to Congress, nullifying the most vital provisions of the 1909 revision of the copyright laws, and confiscating

appellees' right of public performance for profit by barring them from licensing their copyrighted musical compositions in the only manner that is commercially feasible; (2) it discriminates against owners of copyrighted works.

Before discussing these objections, it will be necessary to examine the practical operation of the statute rather than the form of descriptive words which it employs (cf. *Nelson v. Sears, Roebuck & Co.*, 85 L. Ed. 522, 524 [1941 Adv. Sh.]; *Best & Co. Inc. v. Maxwell*, 61 Sup. Ct. 334, 85 L. Ed. 274, 275 [1941 Adv. Sh.]; *Thompson v. Consolidated Gas Utilities Corp.*, 300 U. S. 55, 79-80 [1937]).

(a) The provisions of the State Statute shows clearly that it attempts to nullify or abridge the provisions of the Copyright Law which give to owners of copyrighted musical compositions the exclusive right of *public performance for profit* as interpreted by numerous decisions. *Herbert v. Shanley*, 242 U. S. 591; *Buck v. Jewell-LaSalle Realty Co.*, 283 U. S. 191; *Pastime Amusement Co. v. M. Witmark & Sons*, 2 F. (2d) 1020 (C. C. A. 4), aff'd 298 Fed. 470; *Berlin v. Daigle*, 31 F. (2d) 832 (C. C. A. 5); *Harms v. Cohen*, 279 Fed. 276 (E. D. Pa.); *M. Witmark & Sons v. Calloway*, 22 F. (2d) 412 (E. D. Tenn.); *Lutz v. Buck*, 40 F. (2d) 501 (C. C. A. 5), cert. den. 282 U. S. 880; *Buck v. Lester*, 24 F. (2d) 877 (E. D. S. C.); *Buck v. Heretis*, 24 F. (2d) 876 (E. D. S. C.); *Remick v. American Automobile Accessories Co.*, 5 F. (2d) 411 (C. C. A. 6); *Society of European Stage Authors, Composers and Publishers v. New York Statler Hotel*, 19 F. Supp. 1 (S. D. N. Y.); *Messenger v. British Broadcasting Co.* [1928] 1 K. B. 660, 140 L. T. R. 227; rev'd on other grounds [1929] A. C. 151.

(b) The State Statute does not contain any legislative finding as to any existing evil requiring its passage. Nor was any established at the trial. The court below held that the Act could not be justified as a method of exercising the police power of the State (R. I, 131).

(c) The State Statute was not prompted by any *bona fide* desire to protect the State of Nebraska against combinations monopolizing or restraining trade for the following reasons:

(1) The pre-existing Nebraska statutes amply regulate and punish all such combinations (Comp. St. Neb. 1929, Art. 8, Ch. 59, Secs. 801-822).

(2) The State Statute condemns appellees by *declaring* their Society to be operating in restraint of trade (Sec. 1). It does not give them an opportunity to show the reasonableness of the combination, whereas other combinations are exempt from the general Nebraska anti-trust laws if they are found to be reasonable. *Cf. Brock v. Hardie*, 114 Fla. 670, 154 So. 690, 693, 696 (1934).

(3) It was neither reasonable nor necessary to exempt, by non-inclusion, owners of non-copyrighted works (*i. e.*, unpublished works enjoying common-law protection) and combinations of users, who are permitted to buy outright the copyrights of a substantial number of copyright owners (the copyright owners acting independently of each other, but the users acting collectively).

(4) The penalties and confiscatory provisions of the State Statute were not reasonably necessary to meet any alleged evil (Secs. 8 to 11B).

(5) It was not reasonable to give the 391 users in the State the right to use appellees' copyrighted works without compensation and to bar appellees from suing for infringement (Secs. 4-A, 4-B, 5-A, 5-B, 6).

(6) It was not reasonable to extend the prohibitions of the Act to composers, authors and publishers of copyrighted works not acting in concert (Secs. 2-A, 2-B and 6).

(7) It was not reasonable to create arbitrary presumptions for the purpose of subjecting appellees to the juris-

diction of the Nebraska courts although they are all non-residents of the State (Secs. 4-B, 5-B, 6, 7-A, 7-B).

The private purpose which motivated this statute is apparent when viewed in the light of the many previous attempts of users to destroy the Society as a means of obtaining free use of appellees' copyrighted works (*supra*, pp. 19-23).

A. THE ACTION OF CONGRESS IN FULLY COVERING THE FIELD IN THE 1909 REVISION OF THE COPYRIGHT ACT BARS THE STATES FROM MAKING ANY REGULATIONS IN THAT FIELD.

The Constitution of the United States completely removed the regulation of copyrights from the sphere of state jurisdiction and vested supreme power in that subject in the Congress of the United States. Article 1, Section 8, Clause 8, gives the Congress the power:

“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the *exclusive* Right to their respective Writings and Discoveries;”

Of course, no principle is better settled than that the States may not trespass upon the powers delegated by the Constitution to the Congress when the field has been occupied by the latter. However, two of the cases of this Court are collected in the footnote.⁸ As Mr. Justice FRANKFURTER pointed out in his work, *Mr. Justice Holmes*

⁸ *Napier v. Atlantic Coastline Ry. Co.*, 272 U. S. 605 (Georgia and Wisconsin statutes requiring certain safety appliance on locomotives, held in conflict with Federal Locomotive Boiler Inspection Act although Interstate Commerce Commission had not exercised its authority in field covered by State legislation; *Jennings v. United States Fidelity & Guaranty Co.*, 294 U. S. 216, 226 (Indiana statute held inconsistent with system of equal distribution among creditors of national banks as established by federal law).

and the Supreme Court, at page 72 (1938), the purpose of conferring certain powers upon Congress was to overcome the dangerous "Balkanization" of this nation which existed before the Constitution was adopted.

Congress, in 1909, made a sweeping general revision of the copyright laws for the purpose of making simple, certain and uniform the requirements for the protection of literary property throughout the country. The Report by Mr. Currier, from the Committee on Patents of the House of Representatives on February 22, 1909, in submitting the bill which subsequently became the Copyright Act of 1909, stated that the Copyright Act "should be revised so that protection to the honest literary worker, artist, or designer shall be *simple* and *certain*." (H. R. Report No. 2222—Sixtieth Cong., 2d Sess., 1909, p. 1.)

The fact that there were different federal laws relating to copyright was abhorred by President Roosevelt in his message to Congress in December, 1905, in which he urged a general revision. The President then said (Report No. 2222, pp. 1-2):

"Our copyright laws urgently need revision. They are imperfect in definition, confused and inconsistent in expression; they omit provision for many articles which, under modern reproductive processes, are entitled to protection; *they impose hardships upon the copyright proprietor which are not essential to the fair protection of the public*; they are difficult for the courts to interpret and impossible for the Copyright Office to administer with satisfaction to the public. Attempts to improve them by amendment have been frequent, no less than 12 acts for the purpose having been passed since the Revised Statutes. To perfect them by further amendment seems impracticable. A complete revision of them is essential. Such a revision, to meet modern conditions, has been found necessary in Germany, Austria, Sweden, and other foreign countries, and bills embodying it are pending in England and the Australian

colonies. It has been urged here, and proposals for a commission to undertake it have, from time to time, been pressed upon the Congress.

"The inconveniences of the present conditions being so great, an attempt to frame appropriate legislation has been made by the Copyright Office, which has called conferences of the various interests especially and practically concerned with the operation of the copyright laws. It has secured from them suggestions as to the changes necessary; it has added from its own experience and investigation, and it has drafted a bill which embodies such of these changes and additions as, after full discussion and expert criticism, appeared to be sound and safe. In form this bill would replace the existing insufficient and inconsistent laws by one general copyright statute. It will be presented to the Congress at the coming session. It deserves prompt consideration."

The Committee further quoted a statement of Thorvald Solberg, Register of Copyrights, to the effect that "the laws as they stand fail to give the protection required, are difficult of interpretation, application and administration, lead to misapprehension and misunderstanding and in some directions are open to abuses" (*Ibid*, p. 2).

The Committee pointed out that such a situation existed when the Constitutional Convention met, and the copyright clause was adopted to remove such burdens upon authors. The Committee's Report states (*Ibid*, p. 2):

"When the convention met and framed the Constitution of the United States copyright laws existed in 12 of the 13 States, but the requirements for the registration of copyrights differed greatly, making it burdensome to an author seeking to protect his work. *The need of a law which would be effective in all the States was so apparent that a provision was incorporated in the Constitution, * * *.*"

It was felt that Congress was creating new property rights and could annex to their enjoyment such conditions

as *Congress* deemed expedient (Report No. 2222, p. 9, citing *Wheaton v. Peters*, 8 Pet. 591 [1834]).

The 1909 Law fully covered the field of copyright within the grant of constitutional power by stating explicitly the nature of the rights granted, designating the persons who might enjoy them, limiting such rights to a fixed period of time, prescribing the remedies for infringement including the recovery of minimum damages, establishing the means of safeguarding the public against innocent infringement, regulating assignments, and specifying certain conditions for the enjoyment of specific rights granted.

All rights granted under the 1909 Copyright Law were expressly made exclusive (Sec. 1). This Court had many times previously passed upon the exclusive nature of those rights. *Burrows-Giles Lithograph Co. v. Sarony*, 111 U. S. 53, 56, 59 (1884); *American Tobacco Co. v. Werckmeister*, 207 U. S. 284, 291 (1907); *Caliga v. Inter Ocean Newspaper Co.*, 215 U. S. 182, 188 (1909).

Not even the United States may invade the *exclusive* rights of owners of copyrights or patents. *United States v. Dubilier Condenser Corp.*, 289 U. S. 178, 186, 189 (1933); *James v. Campbell*, 104 U. S. 356, 358 (1881); *United States v. American Bell Telephone Co.*, 167 U. S. 224, 249-50 (1887). *A fortiori*, the State of Nebraska may not invade these exclusive rights in the manner attempted by the State Statutes.

It is well settled, that copyright owners cannot be compelled to grant licenses except upon their own terms and at prices fixed by such owners (*F. A. D. Andrea, Inc. v. Radio Corp. of America*, 88 F. (2d) 474 (C. C. A. 3), *aff'g* 14 F. Supp. 226, cert. den. 300 U. S. 681; *Buck v. Hillsgrove Country Club, Inc.*, 17 F. Supp. 643 [D. C. R. I.]). The several States may not pass laws to the contrary (*Henry Bill Pub. Co. v. Smythe*, 27 Fed. 914, 917 [S. D. Ohio]).

Congress included among the separate and distinct exclusive rights granted to the owner of a copyright in a musical composition the exclusive right:

“(a) To print, reprint, publish, copy and vend the copyrighted work * * *.”

“(e) To perform the copyrighted work publicly for profit if it be a musical composition and * * * to make * * * any form of record in which the thought of an author may be recorded and from which it may be read or reproduced * * *” (Act of Mar. 4, 1909, 17 U. S. C., § 1).

The exclusive *performing* rights (Sec. 1(e), *supra*) include performances by live musicians in hotels, restaurants and night clubs (*Herbert v. Shanley*, 242 U. S. 591 [1917]); performances by means of radio broadcasting or rebroadcasting (*Buck v. Jewell-LaSalle Realty Co.*, 283 U. S. 191 [1931]); and by means of radio receiving sets in hotel rooms operated from a master-controlled set (*Society of European Stage Authors and Composers, Inc. v. New York Statler Hotel, Inc.*, 19 F. Supp. 1 [1937, S. D. N. Y.]).

The only limitation which the Copyright Act places upon the exclusive rights granted by Section 1 is that under certain circumstances a manufacturer of phonograph records may record a copyrighted work without the consent of the author upon paying two cents for each record made; but the payment of this two cent royalty does not give the manufacturer the right of public performance for profit. This provision (Section 1[e]) reads in part as follows:

“* * * whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of two cents on each such part manufactured, to be paid by the manufacturer thereof; and the copyright proprietor may require, and if so the manufacturer shall furnish, a report under oath on the twentieth day of each month on the number of parts of instruments

manufactured during the previous month serving to reproduce mechanically said musical work, and royalties shall be due on the parts manufactured during any month upon the twentieth of the next succeeding month. *The payment of the royalty provided for by this section shall free the articles or devices for which such royalty has been paid from further contribution to the copyright except in case of public performance for profit: And provided further, That it shall be the duty of the copyright owner, if he uses the musical composition himself for the manufacture of parts of instruments serving to reproduce mechanically the musical work, or licenses others to do so, to file notice thereof, accompanied by a recording fee, in the copyright office, and any failure to file such notice shall be a complete defense to any suit, action, or proceeding for any infringement of such copyright.*

"In case of the failure, of such manufacturer to pay to the copyright proprietor within thirty days after demand in writing the full sum of royalties due at said rate at the date of such demand the court may award taxable costs to the plaintiff and a reasonable counsel fee, and the court may, in its discretion, enter judgment therein for any sum in addition over the amount found to be due as royalty in accordance with the terms of this Act, not exceeding three times such amount.'b

The Copyright Law permits a purchaser of a phonograph record or electrical transcription to perform it privately, but he may not perform it *publicly for profit* without the express consent of the copyright owner. *Irving Berlin, Inc. v. Daigle*, 31 F. (2d) 832 (C. C. A. 5); *Lutz v. Buck*, 40 F. (2d) 501, cert. den. 282 U. S. 880.

This separation of the *recording* right from the *performing* right carries out the general purpose of the Copyright Act to separate all of the several rights embraced in a copyright from the rights transferred by a sale or other

disposition of the material object copyrighted (such as a book, motion picture film, sheet of music, etc.).⁹

The separate rights which a copyright owner obtains, are listed in subdivisions "(a)" to "(e)" of Section 1 of the Copyright Act. Section 3 of the Copyright Act permits a further subdivision of the rights in a copyrighted work by directing "that the copyright * * * shall protect all the copyrightable component *parts* of the work copyrighted."

The rights granted under the Copyright Act are not mere personal rights which the author alone may enjoy. They have all the attributes of property. They may be assigned or bequeathed; and the successors in interest have the same exclusive rights which the author himself enjoyed. Section 8 of the Copyright Act provides "that the author *or proprietor* of any work made the subject of copyright by this Act, or his executors, administrators or *assigns*, shall have the copyright in such work under the conditions and for the terms specified in this Act * * *." The only persons who are not accorded all these rights are certain

⁹ Section 41 reads as follows (Copyright Office Bull. No. 14, p. 22):

"Sec. 41. The copyright is distinct from the property in the material object copyrighted, and the sale or conveyance, by gift or otherwise, of the material object shall not of itself constitute a transfer of the copyright, nor shall the assignment of the copyright constitute a transfer of the title to the material object; but nothing in this Act shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained."

Purchase of the material object (*e. g.* engraved plates, books, sheets of music, etc.) was held not to give any rights in the copyright in *Stephens v. Cady*, 14 How. 528 (1852); *Stevens v. Gladding*, 17 How. 447 (1854); *Henry Bill Pub. Co. v. Smythe*, 27 Fed. 914, 921 (S. D. Ohio); *Harms v. Cohen*, 279 Fed. 276, 280 (E. D. Pa.); *National Geographic Soc. v. Classified Geographic*, 27 F. Supp. 655, 660 (D. C. Mass.); *Davenport Quigley Expedition v. Century Productions*, 18 F. Supp. 974 (1937, S. D. N. Y.); *Chappell v. Boosey*, 21 Ch. Div. 232 (1882).

alien authors or proprietors. All citizens of the United States are entitled to the benefit of all the provisions of the Copyright Act.

B. THE STATE STATUTE CONFISCATES APPELLEES' RIGHT OF PUBLIC PERFORMANCE FOR PROFIT.

It has been shown that both in the United States and elsewhere, it has been impossible to detect infringements of, or to license, the right of public performance for profit except through collective action on the part of composers, authors and publishers. The unorganized composer, author and publisher even now suffer from unlimited piracy of their works. Appellee Society alone compels the bulk of the users to respect the Copyright Act. If a composer or author is not a member of the Society, his works are freely infringed. The users pay no attention whatsoever to the copyright status of the works they use; they keep no record of them (R. I, 337, 375-6, 397, 400, 416-417, 434); broadcasters make no effort to ascertain the titles or copyright status of compositions transmitted by them (R. I, 397, 400, 416, 434); the state statute under attack does not require the users to keep such a record. So helpless is the individual author that users other than the large radio networks have never been compelled to pay royalties or to defend infringement suits brought by individual composers, authors or publishers (R. 375, 397, 400-1, 416, 434, 449). Broadcasters do not pay individual composers for their music (R. I, 460; 376-7). Station WOW only once paid an author a performance fee—on that occasion the fee was one dollar (R. I, 436).

The State Statute bars authors from acting collectively in the only manner available to them; and if they do act collectively, the users are given free use of their works. Thus, by statute, the author is faced with the dilemma of losing his performing rights by failing to employ the only available means to protect them; or he may employ such means, only to have the statute strip him of his rights.

Section 1 of the State Statute provides that if composers and authors engage in such cooperative enterprise wherein a single fee is fixed for the right to perform any or all of the compositions embraced in their repertoires, they shall be barred from collecting any license fees from persons who render their copyrighted compositions "privately or publicly" through personal performance or through radio or any instrumentality or sound-producing apparatus and forbids such license fees from being collected "in *any* court *within* the boundaries" of Nebraska and provides that each such collection or attempted collection "shall be a separate offense hereunder" and such combination is "declared to be an unlawful monopoly in this State" (Sec. 1). All *existing* agreements of such a cooperative group are invalidated and their attempted enforcement is made unlawful (Sec. 3).

Sections 4-A, 4-B, 5-A and 5-B expressly permit all broadcasting stations, theatres, moving picture houses and similar places of entertainment, to perform publicly for profit any and all of the musical compositions copyrighted by members of any society condemned by Section 1 without the payment of any copyright royalties and without any liability for infringement.

Section 6 of the State Statute grants to Nebraska users the free use of all copyrighted musical compositions, *whether owned by members of a combination or not*, if the means of reproduction or the talent giving the performances come into the State from outside the State. It is customary to import such means of reproduction and talent from outside the State (R. I, 336, 341-2, 344).

Thus the statute completely confiscates appellees' right of public performance for profit.

C. THE STATE STATUTE ABRIDGES AND REGULATES RIGHTS GRANTED TO APPELLEES UNDER THE COPYRIGHT ACT, AND BARS THEM FROM SEPARATELY LICENSING THE SEVERAL RIGHTS GRANTED TO THEM BY CONGRESS.

(1) Sections 2-A and 2-B of the State Statute nullify sections 1(e) and 41 of the Copyright Law (quoted *supra*,

pp. 40-41, 42, footnote) by requiring the seller of any copy or record of a copyrighted musical composition to surrender all *performing* rights upon selling copies or records in Nebraska. This prevents the composer and author from selling publication or recording rights to one person and performing rights to others. The court below found that many thousands of copyrighted compositions owned by plaintiffs have been recorded under the compulsory license provision of Section 1(e) of the Copyright Act by manufacturers of phonograph records who pay the copyright owners not more than two cents for each record and such copyright owners have no right to demand any further sums from such manufacturers, and that the plaintiffs and others similarly situated have no control over the sale or disposition of such phonograph records and cannot compel the manufacturer to affix any price upon them, or to collect a price for the public performance for profit, or if collected to remit the sum collected for the public performance for profit (Finding "16", R. I, 137). There are a great number of separate performing rights each of which is licensed to different persons.

(2) The State Statute (Secs. 1, 4-A, 4-B, 5-A, 5-B, 6) deprives copyright owners of the right to license the re-broadcasting of their works as well as the public performance of their works by means of radio receiving sets, thus setting at naught rights granted by the Congress under the Copyright Law.

(3) The State Statute deprives copyright owners of the right to license their copyrighted works to licensees in other States, by providing that a license given to users outside the State confers a license upon users in the State of Nebraska without the separate consent of the copyright owner, and in fact, regardless of his consent (Secs. 4-B, 5-B, 6).

(4) Suits for infringement in the federal courts against Nebraska users are barred whenever such Nebraska user

imports from without the State, the means for giving such performances (Sec. 6).

(5) All composers, authors or publishers of copyrighted musical compositions, whether or not members of a combination condemned by Section 1, must file in the office of the Secretary of State a copy of each such composition accompanied by a filing fee of twenty-five cents for each copy filed. (Sec. 2D) This sets up a system of registration separate and apart from that required in the Copyright Act.

(6) The Copyright Law (Tit. 17, U. S. C.), provides all the safeguards against innocent infringement that Congress has deemed necessary or proper. The Copyright Law provides that every copy of the copyrighted work must bear a *notice of copyright*; that *copies must be deposited* in the Office of the Register of Copyrights; that the copyright notice must state the *name of the proprietor* and the *year in which copyright was secured* (17 U. S. C., Secs. 9, 12, 18). *Assignments* of copyrights must be *recorded* with the Register of Copyrights (17 U. S. C., Secs. 42-46). The *Register of Copyrights keeps a full index* of all copyright registrations and assignments which is printed at periodic intervals, furnished to all parties desiring them at a nominal price (17 U. S. C., Secs. 56, 57). The *Record books* of the copyright office are *open to public inspection*. The State Statute sets up a new system of registration distinct from and in conflict with that set up by Congress.

This phase of the Copyright Act was recently considered by this Court in *Washingtonian Pub. Co. v. Pearson*, 306 U. S. 30 (1939).

The requirement of the State Statute that a copy of each composition must be filed before licensing the same has no possible relation to any public interest of that State, and its purpose can only be to harass and annoy appellees and to make it so expensive and impossible to comply with the Statute as to cause appellees to abandon any attempt to enforce and protect their copyrights in Nebraska.

D. THE STATE STATUTE DISCRIMINATES AGAINST OWNERS OF COPYRIGHTED WORKS.

Although in certain instances states may make laws which may affect rights derived from the Federal Constitution, such laws must be reasonable and must not discriminate against the exercise of a federal right. *Fox Film Corp. v. Doyal*, 286 U. S. 123 (1932); *Best & Co. v. Maxwell*, 61 Sup. Ct. 334 (1940); *Walling v. Michigan*, 116 U. S. 446, 454 (1886); *Welton v. Missouri*, 91 U. S. 275 (1875); *Bethlehem Motors Co. v. Flynt*, 256 U. S. 421 (1921); see *Bacardi Corp. v. Domenech*, 311 U. S. 150 (1940).

The State Statute ignores this principle.

(1) *The State Statute discriminates against owners of copyrighted musical works by failing to include, and thereby exempting, owners of musical works protected under the common law.*

The State Statute does not affect *common law* rights in musical compositions; they are in terms limited to "copyrighted" compositions. Those rights are not destroyed until the work is published, after which time the author must rely solely upon rights granted under the Copyright Law. *Wheaton v. Peters*, 8 Pet. 591 (1834). •

The public performance of a dramatic or musical composition is not a publication and does not destroy common law rights. *Ferris v. Frohman*, 223 U. S. 424, 435 (1912); *Nutt v. National Institute, Inc.*, 31 F. (2d) 236, 238 (C. C. A. 2).

This likewise applies to performances by means of radio broadcasting. *Uproar Co. v. National Broadcasting Co.*, 8 F. Supp. 358, 362 (D. C. Mass.) mod. 81 F. (2d) 373, cert. den. 298 U. S. 670.

It must be remembered that the State Statute does not apply to combinations relating to the licensing of publication rights or motion picture rights or any other right under the Copyright Law except *performing* rights. The performing rights, unlike the publication rights, are just as

valuable and just as useful whether a work is copyrighted or merely protected by the common law.

The State Statute permits all the owners of *non-copyrighted* musical and dramatico-musical works throughout the world, to combine to fix the price at which they would grant licenses for the public performance of their works without being subject to the penalties of the Act. If this Statute were upheld, no one would copyright his work because of a desire to take advantage of this exemption. Thus, those who have already copyrighted their works and have lost their common law rights would be at a distinct disadvantage. This is not a remote possibility. It is precisely what would happen if this law were upheld.

Composers and authors may send their compositions to performers for the limited purpose of performing their works without publishing or copyrighting the works and without losing any common law rights. If this should be done, the entire purpose of Article 1, Section 8, Clause 8, pertaining to copyrights and the Copyright Act passed in pursuance thereof will be completely nullified. Any law relating to copyrights must subserve the purpose of the copyright clause of the Constitution, which was primarily intended to serve the public interest of the nation by enriching the public domain with works upon the expiration of the term of copyright. This can be accomplished only by encouraging authors to copyright their works. The copyright law gives the necessary inducement by conferring upon copyright owners exclusive rights for a limited period. *Grant v. Raymond*, 6 Pet. 218, 241-3 (1832); *Fox Film Corp. v. Doyal*, 286 U. S. 123, 127-8 (1932); *Kendall v. Winsor*, 21 How. 322, 327-8 (1858).

What incentive remains to copyright a work if the States may pass laws *discriminating* against owners of copyrights as distinguished from rights protected at common law? The evidence in the case at bar shows without contradiction, that with respect to musical compositions, the right of *publication* which was once the most valuable enjoyed by a copyright owner, has now dwindled

to the vanishing point (R. I, 194-5, 306, 478-81, 532, 589; R. II, 643, 663-4, 667-8, 711-13, 740-2, 775-6; Pl. Tr. Ex. 20, R. II, 816-18; Pl. Tr. Ex. 22, R. II, 819).

In 1909, Congress adopted a new policy of extending copyrights to unpublished works as well as to published musical and dramatico-musical works. The report of the Patents Committee submitting the 1909 Copyright Law to Congress stated, "If an author desires to keep his dramatic work in unpublished form and give public representations thereof only, this right should be fully secured to him by law. We have endeavored to so frame this paragraph [Sec. 1(d)] as to amply secure him in these rights" (Rep. No. 2222, H. R. Sixtieth Cong., 2d Sess., 1909, p. 4). At the same time it was made clear in Section 2 of the Copyright Law that Congress did not intend to invade the field of common law rights as to authors who might choose not to secure copyright.¹⁰ The field of common law rights continued to be, as theretofore, solely within the domain of State legislation.

The number of *unpublished* musical works copyrighted under section 11 of the Copyright Law of 1909 has increased in leaps and bounds. Whereas in the fourteen year period from 1912 through 1925, almost four-fifths of all musical compositions registered for copyright were *published* works (284,296 of such compositions being published, the remaining 76,292 being unpublished); for the succeeding fourteen year period, more than one-half of the musical compositions registered for copyright were *unpublished* works (there were only 195,359 published musical compositions copyrighted as against 231,512 unpublished), with the present trend showing a ratio of more than two unpublished copyrighted musical compositions for each such published

¹⁰ Section 2 of the Copyright Act provides:

"2. Nothing in this Act shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor."

work. (See annual catalogues of Register of Copyrights relating to musical compositions.) There are many advantages to be gained in desisting from copyrighting unpublished works. If a work is copyrighted, its duration is limited to a period of fifty-six years. If it is not copyrighted, the owner, so long as he does not publish his work, is entitled to protection under the laws of the several States, including the State of Nebraska *perpetually*.

The discrimination by the Statute against copyrighted works will handicap those who have already copyrighted their works, and will deter others from copyrighting their works in the future.

If the purpose of this Statute be to curb monopolies and combinations in restraint of trade there is no reason for exempting non-copyrighted works. The owners of such works are just as capable of monopolizing the field of performing rights as are owners of copyrighted works.

This classification shows on its face that the true purpose of the Statute is to deprive copyright owners, and especially the members of appellee Society, of rights granted to them by the Federal Constitution. Such a Statute cannot be upheld. *Hale v. Bimco Trading, Inc.*, 306 U. S. 375 (statute aimed at interstate commerce); *Truax v. Raich*, 239 U. S. 33 (statute designed to restrict aliens' right to secure employment); *Buchanan v. Warley*, 245 U. S. 60 (discrimination against colored race under guise of protecting public against race-riots); *Schneider v. State*, 308 U. S. 147; *Grosjean v. American Press Co.*, 297 U. S. 233; *DeJonge v. Oregon*, 299 U. S. 353; and *Lovell v. City of Griffin*, 303 U. S. 444 (statutes limiting right of free speech and free assembly under guise of police power); *State ex rel. Fulton v. Ives*, 123 Fla. 401, 167 So. 394 (invasion of barbers' right of contract not justified by public welfare).

In *Schneider v. State*, 308 U. S. 147, *supra*, it was said at page 161:

"In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be

astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."

(2) *The penalties and forfeitures imposed for violation of the State Statute are far more severe than those imposed under other Nebraska laws on combinations actually monopolizing or restraining trade.*

The laws of Nebraska defining and punishing combinations which *actually* monopolize or restrain trade are found in Compiled Statutes, Neb., 1929, Article 8, Chapter 59, sections 801-822.

Sections 801 and 802 of the general anti-trust law impose a fine of not more than \$5,000 or imprisonment for one year, or both.

The State Statute involved in the case at bar imposes these penalties by reason of the provision making all penalties *cumulative* (Section 13). Section 8 of the State Statute imposes *additional* penalties of not more than \$5,000 or imprisonment of one year, or both. *In addition*, the State Statute deprives groups affected by it of certain rights and copyrights granted under the Federal Constitution and Statutes; it nullifies all existing contracts, declares them to be entered into as intrastate transactions and in restraint of trade, and makes their attempted enforcement a violation of the Statute (Section 3).

The State Statute penalizes persons affected by it by giving to users in Nebraska a free license to perform their

works if such performances are made by means of picking up broadcasts emanating from outside the State or by means of importing electrical transcriptions, sound projection instrumentalities or apparatus, performers, musicians, singers, players, orchestras, bands or other artists or talent (Sections 4-A, 4-B, 5-A, 5-B and 6), and prohibits the persons affected from obtaining redress in the Federal courts for the infringement of their works (Section 6). It subjects them to the jurisdiction of the State of Nebraska even though in fact, they are not present within the State (Sections 7-A, 7-B, 9, 10-A and 10-B). It makes all their agents, no matter how innocent, guilty of a violation of the Act and subject to all the penalties under Section 7-B—a provision not to be found in the general laws of Nebraska relating to monopolies and restraints of trade.

SECTION 9 permits the dissolution of any condemned combination which includes a combination which may be wholly outside the State of Nebraska, under Section 1, which extends its scope to the entire United States. The general law contains no such provision. It empowers the State to regulate and punish only those corporations which *actually* do business in the State (Sections 807-812). The general law, however, does not resort, as does the State Statute, to a fiction by which foreign corporations are *deemed* to be doing business in the State.

SECTION 11-A compels those subject to the State Statute to furnish exact copies of all documentary evidence, records or data which may incriminate, and Section 11-B makes the failure to furnish such documents a contempt of court and carries with it a fine of \$100 for each day of failure to furnish such documents. The general law of Nebraska authorizes the subpoenaing of all persons, but it grants immunity from prosecution to all persons summoned and examined for any violations of such laws (Sections 808, 822).

This comparison of the laws defining and punishing actual monopolies and restraints of trade with the State Statute which creates a presumption of guilt regardless of whether trade is actually monopolized or restrained, is very significant. It shows a deliberate intention to discriminate against the persons subject to the State Statute, to deny them the equal protection of the laws, and to deprive them of their property without due process of law.

(3) *The State Statute discriminates against copyright owners by denying them the right to show the reasonableness of their association and the fact that they do not actually monopolize or restrain trade.*

The statutes relating to combinations monopolizing or restraining trade generally as defined in Article 8, Chapter 59 of the Compiled Statutes of Nebraska do not condemn them unless they *actually* monopolize or restrain trade (Secs. 801-822, *supra*). *Cooperative* associations such as the *Society*, have been held not to be in violation of the general anti-trust laws of the State, *Nebraska Wheat Growers Assn. v. Norquest*, 113 Neb. 731, 734, 204 N. W. 798 (1925).

In spite of this exemption of cooperative associations generally, a cooperative association of composers, authors and publishers of copyrighted works is declared illegal and discriminated against under the State Statute, even though they do not deal with any article of trade or commerce. No economic reason has been advanced for discriminating against an association of copyright owners operating in a field where cooperative action alone will protect composers and authors and where they do not deal with any article of trade or commerce.

II. The attempt to destroy appellees' property rights by legislative fiat constitutes a violation of the Fourteenth Amendment, and invalidates the Statute in its entirety. In effect the Statute is a bill of attainder.

A. THE STATUTE FALLS SQUARELY WITHIN THE CONDEMNATION OF *McFarland v. American Sugar Refining Co.*, 241 U. S. 79, BY CREATING ARBITRARY PRESUMPTIONS MAKING APPELLEES PRIMA FACIE GUILTY.

(1) The attempt to destroy the Society by a Statute which declares that it shall be deemed to be in restraint of trade without giving the Society a right to show that it is not in restraint of trade is similar to the attempt of the State of Louisiana in *McFarland v. American Sugar Refining Co.*, 241 U. S. 79, to legislate the American Sugar Company out of existence in that state. A statute there declared the business of refining sugar to be impressed with the public interest "by reason of the nature and by reason of the monopolization thereof", and on that footing certain regulations were made. It authorized an inspector to make reasonable regulations affecting any branch of sugar refining in the public interest and to prevent monopoly, and then provided that any person engaged in the business of refining sugar within Louisiana who systematically paid in Louisiana a lower price for sugar than he paid in any other state "shall be *prima facie* presumed to be a party to a monopoly or combination or conspiracy in restraint of trade." Drastic penalties followed, as in the case of the State Statute leading ultimately to the appointment of a receiver. Failure to operate a plant for a period of one year or to sell it within six months thereafter also gave rise to the appointment of a receiver with a power to sell the plant within twelve months after appointment. The statute provided that an injunction could be issued or a receiver appointed after a hearing, subject to an appeal.

In that case the court pointed out that the following allegations of the bill "throw special light upon the case" (p. 82): The plaintiff, American Sugar Company, built a new refinery in Louisiana and closed an old one in the State to save expense; it purchased less than one-half of Louisiana sugar crop, often paying lower prices in Louisiana than it would pay in New York. The answer alleged that plaintiff was a monopoly and combination in restraint of trade completely controlling the sugar trade in Louisiana; that suits had been brought against it by the United States and others under the Sherman Act. Other facts were alleged in the answer attempting to show that the plaintiff was in fact a monopoly. In affirming a decree granting an interlocutory injunction, this Court said at page 85:

"The answer is signed by the Attorney General of the State; and if he were authorized to interpret the meaning of the other voice of the State heard in Act No. 10, would seem to import that the latter was a bill of pains and penalties disguised in general words. For the first division of the answer shows that the plaintiff is the only one to whom the act could apply and that the statute was passed in view of the plaintiff's conduct, to meet it. It is upon the assumption of the latter fact that the argument is pressed that the plaintiff has no standing in equity since it made the legislation necessary. If the connection were admitted it would be so much the worse for the constitutionality of the act. We deem it enough to say that neither that supposed connection nor the general intimations of the plaintiff's wickedness in the answer deprive it of its constitutional rights or prevent it from asserting them in the only practicable and adequate way.

"The statute bristles with severities that touch the plaintiff alone, and raises many questions that would have to be answered before it could be sustained. We deem it sufficient to refer to those that were mentioned by the District Court; a classification which,

if it does not confine itself to the American Sugar Refinery, at least is arbitrary beyond possible justice,—and a creation of presumptions and special powers against it that *can have no foundation except the intent to destroy.*”

In commenting on the presumption making the Sugar Company guilty of being an unlawful monopoly and in holding the *entire* Act invalid, the Court said at page 86:

“As to the presumptions, of course the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. It is ‘essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.’ *Mobile, Jackson & Kansas City R. R. v. Turnipseed*, 219 U. S. 35, 43. The presumption created here has no relation in experience to general facts. It has no foundation except with tacit reference to the plaintiff. But *it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.* If the statute had said what it was argued that it means, that the plaintiff’s business was affected with a public interest by reason of the plaintiff’s monopolizing it and that therefore the plaintiff should be *prima facie* presumed guilty upon proof that it was carrying on business as it does, we suppose that no one would contend that the plaintiff was given the equal protection of the laws. *We agree with the court below that the act must fall as a whole, as it falls in the sections without which there is no reason to suppose that it would have been passed.*”

Applying that decision to the case at bar, the Society is made guilty of being a combination in restraint of trade because its members constitute a substantial number of composers, authors and publishers who have assigned their performing rights to the Society which in turn (in negotia-

tion with users' organizations) fixes the price of a license for the public performance for profit of the copyrighted musical compositions of the members of the Society. That activity is declared to be an unlawful combination in restraint of trade, regardless of whether or not it is in fact and in law such a combination.

(2) In addition to the presumptions of guilt, there are certain conclusive presumptions with respect to doing business in the State, the character of the business, etc., which are not based upon actual facts, and which result in vesting the courts of Nebraska with jurisdiction to deprive appellees of their property without actually being within the jurisdiction of the State. The presumptions are set forth *supra*, pp. 30-32). These arbitrary presumptions cannot be sustained. The State may not deprive appellees of their property which actually has no *situs* in the State of Nebraska or subject them to a personal judgment, as the Statute attempts to do, without actually securing jurisdiction over their persons. The Statute attempts to vest such jurisdiction in the Nebraska courts by setting up fictions which would bring them within the State. Such an attempt was condemned in *Bailey v. Alabama*, 219 U. S. 219, where it was said at page 244:

"What the State may not do directly it may not do indirectly. If it cannot punish the servant as a criminal for the mere failure or refusal to serve without paying his debt, it is not permitted to accomplish the same result by creating a statutory presumption which upon proof of no other fact exposes him to conviction and punishment."

In *Morrison v. California*, 291 U. S. 82, it was said at page 90:

" . . . 'The legislature may go a good way in raising [a presumption] or in changing the burden of proof, but there are limits.' *McFarland v. American Sugar Co.*, 241 U. S. 79, 86. What is proved

must be so related to what is inferred in the case of a true presumption as to be at least a warning signal according to the teachings of experience. 'It is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.' "

One of the extreme extents to which the State Statute goes in creating a conclusive presumption opposed to the actual fact is found in the provision of Section 6 that "the use or rendition by radio broadcast, radio re-broadcast" of a copyrighted musical composition "shall be considered for the purpose of this Act, as *intrastate* business of this State and subject to the control, regulation and prohibition set forth in this Act, notwithstanding that such copyrighted musical compositions originated or emanated from *without* this State." Of course, radio broadcasts know no state frontiers.¹¹

B. THE STATE STATUTE DISCRIMINATES IN FAVOR OF THOSE WHO HAVE NOT COPYRIGHTED THEIR COMPOSITIONS PURSUANT TO THE STATUTE OF 1909, BUT RELY UPON THEIR COMMON LAW RIGHT, AS AGAINST THOSE WHO HAVE AVAILED THEMSELVES OF THE 1909 ACT.

The discrimination here referred to has been fully covered under the preceding point (*supra*, pp. 47-51). What is there set forth need not be repeated because the only difference is that there the discrimination is shown to violate the copyright provision of the Federal Constitution, and here it violates the equal protection feature of the Fourteenth Amendment. Manifestly there can be no reasonable

¹¹ It is settled that radio broadcasting is interstate commerce (*Fisher's Blend Station v. Tax Commission*, 297 U. S. 650 [1936]; *Federal Radio Communications v. Nelson*, 289 U. S. 266 [1933]), and the subject of broadcasting is entirely covered by the Federal Communications Act (48 Stat. 1064, Title 47, U. S. C. 151-609) pursuant to the "Interstate Commerce" clause of the Federal Constitution.

basis for the discrimination, so far as the objects and purposes of the statute under attack are concerned, between composers and authors who avail themselves of the 1909 Act and those who rely upon their common law right.

C. THE STATE STATUTE DISCRIMINATES IN FAVOR OF COPYRIGHT OWNERS RESIDING OUTSIDE OF THE UNITED STATES, AS AGAINST THOSE WHO RESIDE WITHIN THE UNITED STATES.

The State Statute applies only to "persons, firms or corporations *within the United States* who own, or control vocal or instrumental compositions" (Sec. 1). Foreigners may buy up a great number of American copyrights and combine for the same purposes as appellees without being subject to this law. Such organizations of foreigners already exist, as heretofore shown (R. I, 184, 253, 304). This Statute deliberately exempted them from its operation. No valid reason has been or can be assigned why this discrimination against copyright owners residing in the United States should exist. The American Society represents a great many foreign societies. Under the Statute it would be necessary and proper for these foreign societies to divorce themselves from the American Society and to have a separate licensing agency which could continue to do what the Society now does so long as none of the copyright owners resided in the United States. The Statute is aimed clearly at the American Society of Composers, Authors and Publishers and no other organization.

D. THE STATUTE DISCRIMINATES BETWEEN OWNERS OF COPYRIGHTED MUSICAL COMPOSITIONS AND OTHER COPYRIGHT OWNERS.

The Statute, by failing to include owners dealing in other forms of licensing of copyrighted works, exempts them from its operation. For example, it is well known that the Associated Press and virtually all the newspaper syndicates, license their services on a blanket basis. The news-

paper which subscribes to one of these services must pay, whether it uses the material or not. These associations necessarily deal with a great number of copyrights. A newspaper may subscribe to one or more of the syndicated news services, and may be compelled to pay a stipulated fee for the license accorded, regardless of the actual use of the material supplied by the copyright owner. Each of these syndicates must have a substantial number of copyrighted stories or news items available or they cannot furnish any worthwhile service. Likewise they must fix a blanket fee for the right to use any or all of their respective copyrighted works. Yet they are not subject to the provisions of the State Statute and are not "declared illegal and in restraint of trade" because of their operations.

The same applies in the field of licensing motion pictures and many other forms of copyrights and rights thereunder. But all are exempt from the operation of this Statute.

Discriminations made by the State Statute in condemning solely the creators and owners of property rights in musical compositions who copyright their works are grossly unreasonable. It is as if the Statute should say in terms to composers and authors, "You may injure the public by monopolizing and restraining trade in the licensing of musical compositions—which privilege is denied to those who copyright their works—provided only you fail to copyright your works," or "You may likewise injure the public if you turn your talents to fields other than musical or dramatico-musical works, whether you copyright them or not, provided, only, you do not compose and copyright dramatico-musical compositions," or "You may injure the public in any manner condemned by the Statute so long as you assign your copyrights to persons not residing within the United States." Since performing rights may be licensed whether the works are copyrighted or protected under common law principles, or whether they are owned by Americans or foreigners and since rights under copyrights may be licensed in the manner condemned by

owners of rights in copyrights other than performing rights, the non-existent evils which the Statute is purportedly designed to reach may result from the operations of any of the exempted groups.

III. The State Statute cannot be justified under the police power.

A. THE STATE STATUTE WAS NOT ENACTED IN THE PUBLIC INTEREST.

The court below held that the statute was not a reasonable exercise of the police power of Nebraska (R. I, 131). This conclusion was abundantly justified by the evidence in the case and no attempt was made in the court below to demonstrate that any of the public other than the 391 users of Nebraska would be benefited by the act. They, in turn, would be benefited by escaping the necessity of paying royalties for the use of music duly copyrighted under the laws of the United States. The statute itself cannot be justified as being in the public interest, if it was passed for the benefit of that particular class. The legislature may not, under the guise of protecting the public interest, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. *Lawton v. Steele*, 152 U. S. 133, 137.

B. THE STATUTE IS DESIGNED TO PROHIBIT A LAWFUL ENTERPRISE.

In the case at bar, appellees are engaged in occupations not only harmless in themselves but which bring to countless thousands that pleasure and entertainment which only music affords, and which have been carried on without detriment to the public interest, but to its benefit. They are now, as a practical matter, prohibited by the State Statute. Such interference with the conduct of their private business is arbitrary and unnecessary. *Lawton v. Steele, supra*.

The activities of the Society were held to be entirely lawful in New York in *174 St. & St. Nicholas Ave., Amusement Co. v. Maxwell*, 169 N. Y. Supp. 895, and in *State of Washington v. American Society of Composers, Authors and Publishers* (Super. Ct. Washington, Thurston County, June 10, 1936 [printed in the Appendix]). The Federal Trade Commission came to a similar conclusion (R. I, 231-2). The legality of the foreign affiliated societies, and the necessity for their organization have likewise been upheld. *Performing Right Society, Ltd. v. Magistrates of Edinburgh*, 1922, Sess. Cas. 165; *Performing Right Society, Ltd. v. London Theatre of Varieties, Ltd.* [1924] A. C. 1; *Performing Rights Society, Ltd. v. Thompson*, 34 T. L. R. 351 (K. B., 1918.)¹²

¹² As previously stated (*supra*, p. 24, footnote) a consent decree was entered in the Southern District of New York on March 4, 1941, in a suit instituted by the United States against the Society. For the convenience of the Court, if this decree is deemed relevant to these suits, a copy will be handed up at the time of the argument.* It will be noticed that it makes no adjudication of illegality, but enjoins the Society from refusing to license broadcasters on their request on a per program basis and from refusing to license other users on the basis of individual compositions, when requested. As a part of the settlement of the controversy between the Government and the Society, the latter pleaded *nolo contendere* to a criminal information filed against the Society, its officers and directors, and certain publishing firms, in the Eastern District of Wisconsin. There has never been an adjudication based upon a full exposition of the facts and law that the Society is an unlawful combination under the Sherman Act. There was a decision by a statutory court in the State of Washington (whose previous decision that it was without jurisdiction to entertain the suit brought by the Society to enjoin the enforcement of the Washington statute similar to those *sub judice* was reversed by this Court in *Buck v. Gallagher*, 307 U. S. 95) that the Society had violated the Sherman Act and, consequently, was not entitled to relief (*Buck v. Gallagher* [as yet unreported] W. D. Wash., Dec. 23, 1940). The point on which the decision was based was not raised by any of the defendants in that case. It was advanced by an intervenor (who had not raised the point in his pleadings) after plaintiffs and defendants had submitted the case on testimony previously taken before a special master. Appellees appealed this case to this Court on April 15, 1941, a petition for rehearing having been denied on that day.

National and state anti-trust laws are designed to regulate marketing, and may not be used as a screen to destroy it. Such laws are necessarily based upon the assumption that there is a right way and a wrong way of marketing property. There is only one way by which the owners of copyrighted musical compositions may obtain revenue for the public performance for profit of such compositions, and that way is by collective action. The evidence is conclusive that without such collective action the exclusive right of public performance for profit, vested in the copyright owner, becomes an unenforceable and valueless right, existing in theory only, and robbed of all commercial value. The individual copyright owner standing alone is helpless and hopeless. Necessity compels copyright owners to act collectively in order to exercise the exclusive right of public performance for profit. A statute which prevents them from acting collectively confiscates this right. Instead of promoting the licensing of this right the Statute destroys it.

Since Congress, in 1897 and in 1909, granted to composers the exclusive right to publicly perform for profit, we must assume that it meant to give to such composers something of value. Collective action in this case is the only practical means by which this most valuable right may be vindicated. As this Court said in *Washingtonian Pub. Co. v. Pearson*, 306 U. S. 30, 40, "Without right of vindication a copyright is valueless."

C. APPELLANTS' AUTHORITIES DISTINGUISHED.

Appellants attempt to justify the State Statute as a reasonable regulation affecting commercial dealings in copyrights, under *Allen v. Riley*, 203 U. S. 347; *Patterson v. Kentucky*, 97 U. S. 501; *John Woods & Sons v. Carl*, 203 U. S. 358; *Ozan Lumber Co. v. Union County National Bank*, 207 U. S. 251; *Carbice Corporation v. American Patents Corp.*, 283 U. S. 27, 33; *Fox Film Corp. v. Doyal*,

286 U. S. 123; *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436.

We have already seen that the State Statute was not enacted in the true public interest of the citizens of the State of Nebraska. The provisions of the Statute destroying the rights of copyright owners operating *individually* were certainly not necessary to accomplish the purpose of destroying any alleged *monopoly*. The provisions making the Society an unlawful combination in restraint of trade were not necessary if the Society really is a combination in restraint of trade, because earlier Nebraska Statutes which continue in effect, and the penalties of which are made cumulative, amply provide for the regulation and punishment of combinations in restraint of trade.

The regulations which were held reasonable in the cases relied on by appellants are of an entirely different scope.

In *Allen v. Riley, supra*, a Kansas Statute made it unlawful for any person to sell or barter any patented right without first filing in the particular county a copy of the letters patent, stating under oath that they were genuine and that they had not been revoked or annulled, and that such person had full authority to sell or barter the same. It further required that any note taken in consideration of a patent right must recite "Given for a patent right." These statutes were passed to meet a well-known evil. The Court pointed out that small expense was involved in complying with the statute, and that the statute was a reasonable means of meeting the evil of fraudulent sales of non-existent patents. In upholding the statute, the Court warned against such statutes as the one at bar, saying at page 355:

"To uphold this kind of a statute is by no means to authorize any State to impose terms which, possibly, in the language of Mr. Justice DAVIS, in *Ex parte Robinson*, 2 Biss. 309, 'would result in a prohibition of the sale of this species of property within its borders, and in this way nullify the laws of Congress which regulate its transfer, and destroy the

power conferred upon Congress by the Constitution.' *Such a statute would not be a reasonable exercise of the powers of the State.*"

Woods v. Carl, supra, and *Ozan Lumber v. Union County, supra*, followed *Allen v. Riley, supra*, in interpreting a similar Arkansas Statute.

Patterson v. Kentucky, supra, involved a Kentucky statute which required the inspection of oils and other inflammable fluids used for illuminating purposes, and prohibited the sale for such purposes of any substances which could ignite at a certain temperature. The defendant, who was convicted of selling oil in violation of the statute, defended on the ground that his process was protected by letters patent. The statute was upheld as a reasonably necessary means of protecting the lives and health of the citizens of Kentucky. As the Court pointed out, this was a mere police regulation "strictly and legitimately for police purposes," which said at page 506 that "police regulations which were enacted in *good faith*, and had appropriate and direct connection with that protection to life, health and property, which each State owes to her citizens" must be upheld.

The State Statute here was not enacted in good faith and has no appropriate or direct connection with the protection of the citizens of Nebraska, except to the extent that it immunizes 391 citizens of that State against enforcement of the Federal Copyright Act.

Appellants urged below that the purpose of the Nebraska legislature in passing this Statute cannot be considered, citing *Southwestern Oil Co. v. Texas*, 217 U. S. 114, 126. In that case the court refused to "speculate as to the motives of the State" where there was nothing on the face of the statute or by its necessary operation to justify an assumption that the State had not acted in good faith.

In the case at bar, the purpose of the legislators appears both on the face of the Statute and in its practical operation. The State Statute makes it impossible for

any owner of a copyrighted musical composition to enforce the payment of royalties by Nebraska users who profit from the public performance of such copyrighted works whether the copyright owners act as individuals or whether they act collectively. If the copyright owners act as *individuals*, they are barred from collecting license fees for the public performance for profit apart from the amount charged for the sale of sheet music, and they cannot collect royalties from Nebraska users who import their music from other States by contract with third parties who give such performances by means of records or other articles or devices serving to reproduce the copyrighted work mechanically. If the copyright owners act *collectively* and attempt to issue blanket licenses (as permitted by the consent decree in *United States v. American Society, supra*), they necessarily run afoul of the Statute and are subject to their drastic penalties. If the purpose of this Statute were to regulate monopolies or combinations in restraint of trade, there would be no reason for limiting the rights of copyright owners who act as individuals. Those sections which curtail the rights of individual copyright owners, and which appellants would have this Court ignore, show clearly that the Statute was not passed in the *bona fide* public interest of the State of Nebraska.

Since the Statute *on its face* shows an absence of good faith, it is entirely proper to examine the circumstances surrounding its passage; and since the Statute was obviously passed for the benefit of a few users of music in the State of Nebraska, who secured passage of such Statute (Pl. Tr. Ex. 44, R. II, 853, R. I, 374), that fact is relevant in passing upon the question of whether the Statute was enacted in the public interest.

Carbice Corporation v. American Patents Development Corp., supra,¹³ merely cites the above cases in a footnote at page 33 for the proposition that the grant of a United

¹³ The proposition, broadly stated, decided in the *Carbice* case was that one could not, through the doctrine of contributory infringement, use a patent to procure a monopoly over an unpatented article.

States patent does not exempt the patented product from limitations imposed by said police power. This, of course, does not give the States the right to enact unconstitutional statutes under the guise of protecting the public interest. In that footnote, Mr. Justice BRANDEIS also refers to the case of *Webber v. Virginia*, 103 U. S. 344, where it is said at page 347:

“It is only the right to the invention or discovery—the incorporeal right—which the State cannot interfere with.”

The statute in *Webber v. Virginia* was held to discriminate against non-resident owners of patents and was invalidated on that ground. Referring to those subjects which come under the powers reserved to Congress, the Court there said at page 351:

“Here there can, of necessity, be only one system or plan of regulations, and that Congress alone can prescribe.”

As previously pointed out, if each State were free to make its own regulations on the subject of copyrights, some States might enact statutes like that of the State of Washington considered in *Buck v. Gallagher*, 307 U. S. 95, some might enact statutes like the State Statute, and others might conceive some other form of regulating copyrights. In such event, the constitutional provision reserving to Congress the power to secure to authors and inventors the exclusive rights in their respective writings and discoveries for limited periods of time would be completely nullified.

The State Statute not only discriminates against copyrights, but make the enjoyment of performance rights therein impossible. Those rights are actually confiscated. Thus the copyright owners affected by the Statute, are deprived of the very rights without which, under present day conditions, a copyright in a musical or dramatico-musical work is virtually worthless.

The *Ethyl Gasoline* case, *supra*, involved an *actual* restraint of trade in fixing the prices of non-patented articles moving in commerce.

The Society is not concerned with sheet music or any article of trade. It promotes licensing of copyrights by creating a practical method of licensing in a field where there was no licensing and *no means of licensing* before its organization. If it affects trade or commerce, it promotes rather than restrains it.

IV. The State Statute impairs obligations under existing contracts.

Section 3 of the State Statute provides that "All existing contracts, agreements, licenses or arrangements now existing within this State, made by any person, firm or corporation with any combination declared unlawful under Section 1 hereof, are hereby declared void and non-enforceable in any Court within the boundaries of this State." The collection or attempted collection of moneys thereunder is made illegal and subjects the combination, its agents, members or representatives seeking to enforce the same to the penalties of the Statute. Each collection or attempted collection is a separate offense.

Thus the State Statute destroys all of the 391 contracts now existing between appellee Society (representing all its composer, author and publisher members jointly) and users located in the State of Nebraska.

The Constitution of the United States provides (Art. I, §10):

"No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ."

The contracts between the Society and users in Nebraska and between the Society and its members were valid when made. We need not consider whether these contracts are within the category of those which may be *ex post facto* invalidated in the public interest because, as we have en-

deavored above to show, the purpose of the law in destroying these contracts was solely to benefit the other parties to them at the plaintiffs' expense. It would seem to admit of no argument that that is beyond the power of the State.

In *Worthen Co. v. Kavanaugh*, 295 U. S. 56, 62 (1935), the court invalidated an Arkansas statute which impaired the security of bondholders under the guise of the "public interest," pointing out that the underlying reality rather than the form or label controlled its judgment.

V. The State Statute violates the Fourteenth Amendment by interfering with appellees' right to do business outside the State and interferes with interstate commerce by requiring prices to be fixed on sheets of music and phonograph records coming from outside the State and prescribing the uses that can be made of such compositions and records, as well as by the provisions respecting broadcasting.

The Statute is so framed that in its practical operation appellees will be penalized, regardless of whether they do anything within the State of Nebraska.

For example, under Sections 2-A and 2-B of the Statute, unless the physical copy of the copyrighted composition or a manufactured record or other instrument from which the copyrighted composition may be reproduced, bears a notation as to the selling price for all uses and purposes, including private rendition and public rendition for profit, the purchaser of such copy or manufactured article is given the right to use or render or cause or permit others to use or render the copyrighted work in the State of Nebraska for any purpose whatsoever without further compensation, even though the Copyright Law gives the copyright owner distinct rights of publication and performance which he may separately license or sell.

In other words, when appellees grant the right of publication to publishers located in New York, or are

compelled to grant an involuntary license under Section 1 (e) of the Copyright Law to manufacturers of records located in any part of the United States, unless they see to it that the publisher or the manufacturer affixes to the record or article a price for all uses of the work in the State of Nebraska, the appellees are compelled to forfeit all rights under their copyrights so far as that State is concerned.

The evidence is uncontradicted that appellees have no control over manufacturers of phonograph records or piano rolls, and cannot compel the latter to affix a price (R. I, 191, 490-1, 528-9, 538-9, 578-9; R. II, 621-2, 644, 694, 708-9, 746, 733, 780-1), and that authors have no control over their publishers, and can not compel them to affix a price on the sheet music (R. II, 746). Professional copies are furnished gratis to artists as a necessary part of exploitation (R. I, 312, 317, 511, 560-1, 567). The Court below found that in this respect the statute could not be complied with (Finding "19", R. I, 138).

This penalty is imposed, even though appellees do no business in Nebraska, have no agent within the State, and do not come within the State themselves.

Failure to cause such a price to be affixed results in appellees being deprived of even the right to resort to the Federal Court to redress infringements of their copyrighted works.

All these penalties follow upon acts done or omitted *outside* the State.

If appellee publishers sell sheets of music in New York to purchasers who take them to Nebraska, and if those sheets of music do not have a price affixed thereon, the penalties of the Statute follow just as much as if appellees themselves sold the copies within the State.

The penalties in the form of deprivation of rights under their copyrights, are inflicted not upon the sellers of the sheets of music in Nebraska, but *upon the owners of the copyrights who have done nothing in that State.*

Section 4-A of the Statute gives radio stations the right to broadcast and rebroadcast appellees' copyrighted compositions, free of charge as long as appellees remain members of the Society.

Appellees are prohibited from issuing licenses to, and collecting from radio broadcasting stations located *without* the State, for the privilege of broadcasting or rebroadcasting within the State, because Section 4-B makes it unlawful for any such broadcasting station to pass on the charge to any user located in Nebraska.

Here, again, the Statute penalizes the appellees for acts done without the State.

Sections 5-A and 5-B of the Statute contain similar provisions in favor of motion picture theatres and other places of public amusement and entertainment, and prevent persons furnishing such entertainment from outside the State from collecting any license fees from users located within the State.

Section 6 shows that the whole object of the Statute is to exempt users of copyrighted music in the State from any payment whatsoever, because it is there provided that if the means of performing the music is sent to Nebraska from any other State, *regardless of whether the owner of the copyright is a member of any combination condemned by the Statute*, the sole responsibility rests upon the person located outside the State and not upon the user located within Nebraska, and the copyright owner is prohibited from bringing any suit for infringement in the Federal Courts for such infringing performance within the State.

Section 7-A shows an intent to deprive appellees of their rights notwithstanding the fact that they are not within the State, by providing that if any person acts as a representative in Nebraska for a combination made unlawful by Section 1, he shall be deemed an official representative and agent of the combination, and the combination

shall be deemed to be doing business in the State and service of process may be made upon such representative *or upon any agent of such representative*, with the same effect as if served on an officer or a managing agent or official representative upon whom service upon the combination might be made in the absence of this Statute.

Section 7-B bars the Society from assigning any claim that it has against users in Nebraska for license fees, by providing that any person who attempts to collect license fees, *or who acts as representative or agent for any combination*, is considered a part of the unlawful combination and subject to the penalties of the Statute.

If the Society should withdraw from the State, it would not be able to collect moneys due for license fees under existing contracts.

Any lawyer who attempts to bring suit to collect any such license fees would be guilty of violating this Statute. If he brought such a suit he would be deemed a representative of the Society and the Society would be deemed to be doing business and service upon him would subject the Society to the jurisdiction of the Nebraska courts and the penalties of the Statute under Section 8.

Upon securing such jurisdiction, the State Court is authorized to decree the dissolution of the Society and to enjoin its operations (Sec. 9-A, B, C, D).

If appellees wish to protect themselves against infringements of their works in Nebraska, they must refrain from licensing all persons located outside the State who have any affiliation with users in Nebraska; they must refrain from entering into publication contracts outside the State, unless the publisher agrees to affix a price for all uses of the work in Nebraska, and they must at their peril locate all manufacturers of records and other articles from which the copyrighted work may be produced, in the hope of inducing such manufacturers to affix a price for all uses of the copyrighted work.

Complications that would result from any such endeavor, are so numerous and so obvious, that it would serve no purpose to lengthen this brief by enumerating them.

This Statute is clearly an attempt by the State of Nebraska to project its legislation into other States and to regulate the business of plaintiffs outside the State.

In *Provident Savings Ass'n v. Kentucky*, 239 U. S. 103, a Kentucky statute imposed a tax of 2% on the collections of insurance premiums within the State and provided that any insurance company which had theretofore been authorized to transact business in the State, must report its business to the State so long as it continued to collect premiums from insurance theretofore written. Failure to make the report resulted in a fine of \$500.00.

The Provident Company withdrew from the State and continued to receive premiums by mail in New York City. The State brought suit to recover the tax on premiums for five years after the company withdrew.

That statute was held to violate the Fourteenth Amendment on the ground that the statute was an attempt by the State to penalize the company for acts not done within the State and that it therefore violated the Fourteenth Amendment. This Court said at page 112:

" * * * Taxation without jurisdiction has been held to be a violation of the Fourteenth Amendment (*Louisville & Jefferson Ferry Co. v. Kentucky*, 188 U. S. 385, 398; *Del., Lack. & West. R. R. v. Pennsylvania*, 198 U. S. 341, 358; *Union Transit Co. v. Kentucky*, 199 U. S. 194, 209); and the principle involved applies to the assertion of authority on the part of the State to exact a license tax for the privilege of doing acts which lie beyond the sphere of local control. It follows that the quality of the acts with respect to which the State exercises the taxing power must be considered when the constitutional protection against the transgression of jurisdictional limits is invoked."

In *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U. S. 143, a Connecticut surety company doing business in Mississippi, made a contract in Tennessee, under which it agreed to indemnify the plaintiff company, a Mississippi corporation. The loss occurred in Mississippi and the suit was brought there. A Mississippi statute declared that all contracts insuring any interest in the State "shall be deemed made therein." The State court held that the contract in question was a Mississippi contract, although made elsewhere, and that consequently the provision for a one-year limitation period was void under the Mississippi law although in conformity with Tennessee law. This Court held that law invalid.

In *Allgeyer v. Louisiana*, 165 U. S. 578, the defendants took out an insurance policy with a New York company on their cotton which was shipped from Louisiana.

A Louisiana Statute which provided that any person doing any act within the State to effect insurance on property in that State, and not complying with the State Insurance Law, was subject to a fine of \$1,000 for each offense, was held violative of a citizen's liberty to contract. The Court said at page 589:

"The liberty mentioned in that amendment means not only the rights of the citizen to be free from the mere physical restraint of his person, as by incarceration but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

It was held in *St. Louis Compress Co. v. Arkansas*, 260 U. S. 346, that the imposition of a 5% tax on premiums paid by residents to outside insurers under facts similar

to those of the *Allgeyer* case, was an unconstitutional attempt to regulate extra-territorial activities. This Court there said at page 348:

"In Louisiana the detriment was \$1,000. Here it is five percent upon the premiums—which is three percent more than is charged for insuring in authorized companies. Each is a prohibition to the extent of the payment required. The Arkansas tax manifests no less plainly than the Louisiana fine a purpose to discourage insuring in companies that do not pay tribute to the State. This case is stronger than that of *Allgeyer* in that here no act was done within the State whereas there a letter constituting a step in the contract was posted within the jurisdiction. *It is true that the State may regulate the activities of foreign corporations within the State but it cannot regulate or interfere with what they do outside.*"

The Nebraska Statute would set up just as effective an economic barrier between States as that condemned in *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511.

VI. The court below properly held that the Statute must fall as a whole, and that its various sections cannot be separated.

The scheme of the State Statute is to destroy the right of public performance for profit in the State of Nebraska, whether the right is licensed individually by the separate owners of the copyright or whether it is licensed collectively through the Society.

The right of public performance for profit of all members of the Society has been transferred to the Society for a period expiring December 31, 1940.¹⁶ Under the circumstances, the sections barring the licensing of performing

¹⁶ These agreements are renewed every five years (R. I, 183).

rights separate and apart from the sale of sheet music are presently applicable. Sales of sheet music are controlled by the members of the Society acting individually. The Society has nothing to do with such sales, nor has it anything to do with the manufacture or sale of records; but the Society owns the right of *public performance for profit*, and it is only that right which is affected by *all* the sections of the Statute. Consequently, the validity of every section of the Statute is before this Court.

Where it is probable that certain provisions of the Statute would not have been enacted but for other provisions which are held bad, all the provisions of the Statute must fall together. *Carter v. Carter Coal Co.*, 298 U. S. 238, 316; *Williams v. Standard Oil Co.*, 278 U. S. 235, 243.

To sustain some of these provisions while invalidating others would be to rewrite the Statute and give it an effect altogether different from that sought by the Statute when viewed as a whole. *Railroad Retirement Board v. Alton R. Co.*, 295 U. S. 330, 362.

As this Court said in *McFarland v. American Sugar Refining Co.*, 241 U. S. 79, 87: "the act must fall as a whole, as it falls in the sections without which there is no reason to suppose that it would have been passed."

CONCLUSION.

The decree appealed from should be affirmed.

Respectfully submitted,

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April, 1941.

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